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United States Court of Appeals
for the Fifth Circuit

No. 21-10996

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

JONATHAN DEAN DAVIS,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:20-CR-575

(Filed Nov. 15, 2022)

Before CLEMENT, DUNCAN, and WILSON, *Circuit Judges*.

STUART KYLE DUNCAN, *Circuit Judge*:

Jonathan Dean Davis was convicted of numerous wire-fraud and money-laundering charges arising from a fraudulent scheme to cause the Department of Veterans Affairs to pay over $71 million in GI-Bill funding to his trade school. Davis raises a menagerie of challenges to his convictions and his sentence. We affirm in nearly all respects, except that we vacate the forfeiture order and remand for further proceedings.

I. Factual and Procedural Background

On March 25, 2021, Davis was named in a thirteen-count superseding indictment filed in the Northern District of Texas.[1] Counts 1 through 7 charged Davis with Wire Fraud, in violation of 18 U.S.C. § 1343; and Counts 10 through 13 charged Davis with Money Laundering and Aiding and Abetting, in violation of 18 U.S.C. §§ 1952, 1957.[2] Following a trial, a jury convicted Davis on each of these counts on April 15, 2021.

The charges stemmed from a scheme Davis concocted to defraud the Department of Veterans Affairs ("VA") of vast sums of money. To understand this scheme, consider first some background information on the VA and the Post 9/11 Veterans Educational Assistance Act of 2008 ("GI Bill"). The GI Bill is an educational benefits program that provides financial assistance to eligible student-veterans. The VA agrees to pay up to a certain amount of a student's tuition and fees at VA-approved schools. Notably, this means that for a school to receive tuition payments through GI-Bill funding, it must first go through an approval process. This approval is necessary to ensure that veterans receive sound training and that taxpayer funds are not wasted. *See Cleland v. Nat'l Coll. of Bus.*, 435 U.S. 213,

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[1] The superseding indictment is identical to the initial indictment filed on November 18, 2020, except the superseding indictment reflects corrections to minor date errors.

[2] Counts 8 and 9 charged Davis with Aggravated Identity Theft, in violation of 18 U.S.C. §§ 1022, 1028A. The jury found Davis not guilty of those charges, so they are not at issue in this appeal.

219 (1978). Approval requirements include that the school must have been continuously operational for at least two years and have demonstrated financial stability. To help in the approval process, the VA relies on state-approving agencies that determine which educational institutions are eligible. In Texas, that agency was the Texas Veterans Commission ("TVC"). The TVC ensures compliance with the two-year requirement and also independently requires schools to obtain a Certificate of Approval from the Texas Workforce Commission ("TWC").

We turn to the defendant and the conduct that culminated in his convictions. Davis had been working in the heating, ventilation, and air conditioning ("HVAC") industry since he was 18 years old. In 2005, he began training members of the HVAC industry through his business, Jon Davis Companies, Inc. In 2013, he incorporated a separate business, Retail Ready Career Center Inc. ("Retail Ready"), and opened a company bank account for it. This new entity became a for-profit trade school that offered a six-week HVAC training course for students. The students were primarily military veterans, although some civilian students were also enrolled. The student-veterans would use their GI-Bill funding to pay Retail Ready's tuition.

For Retail Ready to obtain GI-Bill funding when training veterans, Davis first had to obtain VA approval. This is where the fraudulent scheme began. The Government alleged that, in the course of the VA-approval process, Davis "made a series of misrepresentations to fraudulently obtain VA approval for Retail

Ready and to fraudulently induce veterans to enroll as students at Retail Ready." The first step began with the TWC, from which Davis had to receive a Certificate of Approval. In his application, Davis submitted Retail Ready's audited financial statements and certified they were true and correct. But they were not—a fact that Davis himself conceded. Further, the application certified no criminal or civil actions were pending against the school or its owners and officers. Once more, this was not true (Davis had a charge pending against him)—and once more, Davis himself conceded this fact. As further evidence of the falsehoods submitted to the TWC, the Government invoked an electronic journal Davis kept on his computer. In this journal, Davis recounted his interaction with the accountant auditing Retail Ready. Davis wrote: "I then finally found an accountant that will do the audit the way I need it done for $1,000.00." He further explained: "I lied to the accountant that I am using for my audit service, I told him that I don't have anything in the company name other than a lease and I left out having Jay being an employee and that I've had a bank account with expenses out of it because it is a disaster and wouldn't project a very good picture."

The next step in this series of falsehoods, the Government alleged, was that Davis lied to the TVC. In his application to the TVC for VA approval, Davis certified that Retail Ready had continuously operated as an educational institution for the previous two years. This was false. Retail Ready incorporated in May 2013 and Davis certified the two-year requirement was met

when he applied in August 2014. The Government also alleged that Davis lied about Retail Ready's being in sound financial condition by once more providing a second set of misleading financial statements. As a result of these misrepresentations to the state-approving agencies, the Government alleged that the VA approved Retail Ready to begin accepting GI-Bill payments on behalf of student-veterans on August 7, 2014.

The Government next alleged that Davis advanced this scheme by lying to the students themselves. Specifically, Davis induced the veterans to enroll at Retail Ready while concealing the fact that the school had only been approved as a result of the aforementioned fraud. Davis also allegedly misrepresented the career prospects of Retail Ready graduates, and he allegedly concealed just how much of the students' GI-Bill funding would be depleted. Several former student-veterans testified on these points, saying that they were unaware of the fraudulently obtained VA approval; that they were told they would be prepared to work as technicians making $15-$16 an hour but then struggled to find work; and that Retail Ready did not disclose how many months of their GI-Bill benefits would be depleted.

Now consider how all this relates to the wire-fraud and money-laundering charges at issue. Corresponding to each wire-fraud count, the superseding indictment identified seven Retail Ready students who paid their tuition and fees—ranging from $18,053.10 to $20,059.00—through GI-Bill funding. The indictment also identified four specific purchases, corresponding to

each of the four money-laundering counts, that Davis made with proceeds derived from unlawful activity—in this case, the foregoing wire fraud scheme. Those four purchases were: a luxury home for over $2.2 million, a Lamborghini for roughly $430,000, a Ferrari for roughly $280,000, and a Bentley for roughly $260,000.

In April 2021, the jury convicted Davis of these counts. He was then sentenced by the district court. His Presentence Report ("PSR") recommended a total offense level of 38. This consisted of 7 base-level points for wire fraud, a 24-point increase for an intended loss amount of over $72 million, a 2-point increase for using mass marketing, a 2-point increase for using sophisticated means, a 1-point increase for money laundering, and a 2-point increase for obstruction of justice. This yielded a guideline range of 235 to 293 months of imprisonment. Davis objected, arguing the proper offense level was 8, which should have yielded a custody range of 0 to 6 months imprisonment. Disagreeing, the district court sentenced Davis to 235 months of imprisonment. It also ordered $65,200,000 in restitution to the VA, based on the agency's actual loss. Finally, it entered a forfeiture order based on the gross amount of VA funds—over $72 million—that Retail Ready received. Davis now appeals on numerous grounds.

II. Sufficiency of the Evidence

We begin with Davis's sufficiency challenges. Where a defendant properly preserves a sufficiency challenge, as Davis did by moving for acquittal in the

district court, we review the challenge *de novo*. *United States v. Huntsberry*, 956 F.3d 270, 279 (5th Cir. 2020). Our review, however, is "highly deferential to the verdict, and, viewing the evidence in the light most favorable to the prosecution, we consider whether *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Ibid.* (internal quotation marks and citations omitted); *see generally Jackson v. Virginia*, 443 U.S. 307 (1979). "We accept all credibility choices and reasonable inferences made by the trier of fact which tend to support the verdict and resolve conflicts in the evidence in favor of the verdict." *Huntsberry*, 956 F.3d at 279 (internal quotation marks and citations omitted).

A. Wire Fraud

First, we conclude the seven wire-fraud counts are sufficiently supported by the evidence.

Federal law makes it a crime to use interstate wire communications to carry out a "scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1343. To establish a violation of this statute, the Government must prove: "(1) a scheme to defraud exists, (2) the defendant used wire communications in interstate or foreign commerce to further that scheme, and (3) the defendant had specific intent to defraud." *United States v. del Carpio Frescas*, 932 F.3d 324, 329 (5th Cir. 2019).

Davis makes four arguments to support his contention that the evidence was insufficient. Each is unavailing.

First, Davis argues that neither he nor anyone working for Retail Ready was involved in making the seven wires; rather, they were made by the U.S. Treasury at the request of a VA employee. This misunderstands the elements of wire fraud. The evidence need not show that Davis *personally* transferred the funds from the VA into Retail Ready's bank accounts. It need show only that he "transmit[ted] or cause[d] to be transmitted" the relevant communications. 18 U.S.C. § 1343; *see United States v. Johnson*, 700 F.2d 163, 177 (5th Cir. 1983) ("It is not necessary to find that Johnson placed the calls himself in order to find that he 'caused them to be placed.'" (quoting *Pereira v. United States*, 347 U.S. 1 (1954)).

Second, Davis argues the Government failed to prove facts alleged in the indictment because there was no evidence of Davis's conduct on the specific dates of the wires. However, the Government was not required to prove that Davis did something on those precise dates. Its theory was that Davis caused all the transfers to go through as a result of his initial deceptions in the VA-approval process and the continual enrollment of veterans in the program.

Third, Davis argues there was no evidence of a "scheme to defraud" because he lied only about "ancillary matters" and not about Retail Ready's services. *See*, *e.g.*, *United States v. Takhalov*, 827 F.3d 1307, 1313

(11th Cir. 2016) (a "scheme to defraud" under § 1343 refers only to "lies about the nature of the bargain itself"). Davis adds that a "scheme to defraud" encompasses lying to take away someone's property but not to obtain a government license. *Cf. Cleveland v. United States*, 531 U.S. 12, 19–20 (2000) (a "scheme to defraud" under § 1341 does not reach fraud in getting a government license because "such a license is not 'property' in the government regulator's hands"). These arguments are mistaken. The evidence showed Davis's misrepresentations to the VA induced the agency to pay millions in GI-Bill benefits to a school ineligible to receive them. The falsehoods went to the "nature of the bargain" (whether the school was eligible for benefits) and defrauded the government of money, not a license. *Cf. Kelly v. United States*, 140 S. Ct. 1565, 1572–74 (2020) (contrasting "a scheme to alter [the government's] . . . regulatory choice" with a scheme "to take the government's property").

Fourth, Davis argues that the specific intent requirement was not satisfied since the Government presented no evidence of any intent to defraud in 2016 or 2017, which is when the seven wire transfers occurred. We disagree. The Government presented evidence that Davis "lied to [his] accountant," and lied about satisfying the two-year requirement—a requirement he knew was essential for TVC approval based on his previous company's denial on that basis and warnings listed on the TVC's application form. Davis's insistence that this only establishes a culpable intent at one point in time, and not years later when the wires occurred, is inapt

because his lies led to an ongoing receipt of funds to which he was not entitled. *See United States v. Traxler*, 764 F.3d 486, 489 (5th Cir. 2014) (distinguishing "one-shot" operations from "ongoing ventures").

In sum, Davis fails to show that the evidence was insufficient to allow a rational jury to convict him on the wire-fraud counts.

B. Money Laundering

The evidence similarly supported Davis's conviction on the money-laundering counts.

Federal law makes it a crime to "knowingly engage[] or attempt[] to engage in a monetary transaction in criminally derived property of a value greater than $10,000 and [sic] is derived from specified unlawful activity." 18 U.S.C. § 1957(a); *see also id.* § 1957(d). This requires proving three elements: "(1) property valued at more than $10,000 that was derived from a specified unlawful activity, (2) the defendant's engagement in a financial transaction with the property, and (3) the defendant's knowledge that the property was derived from unlawful activity." *United States v. Moparty*, 11 F.4th 280, 298 (5th Cir. 2021).

Davis does not contest that the four transactions comprising the money-laundering charges occurred—that is, that he purchased the luxury house and the three luxury cars. Rather, Davis contests only the first and third elements, arguing that the evidence was insufficient to establish that at least $10,000 of each of

those transactions was derived from unlawful activity, and also insufficient to establish his knowledge that the property was criminally derived.

We first consider Davis's argument that no evidence connected the seven wire-fraud charges to the four transactions. Davis observes that six of the seven wires mentioned in the indictment occurred before the four money-laundering transactions and that those six wires amounted to $113,352.10.[3] He relies on the "clean-funds-out-first rule," which provides that "where an account contains clean funds sufficient to cover a withdrawal, the Government [cannot] prove beyond a reasonable doubt that the withdrawal contained dirty money." *United States v. Evans*, 892 F.3d 692, 708 (5th Cir. 2018) (quoting *United States v. Loe*, 248 F.3d 449, 467 (5th Cir. 2001)). Because there were thousands of deposits into Retail Ready's accounts totaling millions of dollars beyond the seven specifically alleged fraudulent wires, Davis contends he should have been acquitted since he could have paid for the home and the three cars with clean funds.[4]

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[3] The seventh wire occurred after the money-laundering transactions, and so the funds used in those transactions could not have derived from that seventh wire.

[4] Davis also argues that, in any event, relying on uncharged acts of wire fraud constitutes an unconstitutional constructive amendment of the indictment. We disagree. The statute "does not require the indictment to specify which unlawful activity generated the funds in question." *Loe*, 248 F.3d at 468. Rather, " '[n]othing more need be alleged' than that the laundered money was the proceeds of wire fraud in violation of § 1343." *United States v. Caldwell*, 302 F.3d 399, 413 (5th Cir. 2002) (quoting

We disagree. To begin with, Tracy Clark-Ross, a forensic auditor at the VA, testified that the deposits into Davis's bank accounts amounted to $72.2 million in VA funds and $366,000 in other deposits. The total of the money-laundering transactions—$3.2 million—far exceeded the $366,000 in clean funds, and so sufficient evidence showed that Davis necessarily relied on tainted funds to make these purchases. This is illustrated by our discussion of the "clean-funds-out-first-rule" in *Evans*. Addressing a situation where "a defendant makes several withdrawals, each individually for less than the clean-fund total in his account," *Evans* explained:

> Viewed individually, a particular withdrawal would only use clean money, even though in aggregate the defendant would have had to dip into tainted funds. To cope with this problem, we aggregate the transactions—when the aggregate amount withdrawn from the account exceeds the clean funds, individual withdrawals may be said to be of tainted money, even if a particular withdrawal was less than the amount of clean money in the account.

United States v. Smith, 44 F.3d 1259, 1265 (4th Cir. 1995)). The Government was thus free to pursue seven specific wire-fraud charges, while nevertheless insisting on the existence of a broader fraudulent scheme, involving a plethora of fraudulent wires, from which funds were derived for the four money-laundering charges.

Id. at 708–09 (cleaned up). As *Evans* shows, because $3.2 million exceeds $366,000 in clean money, Davis's conviction stands.

We next consider Davis's argument that no evidence suggests he was aware of any crime at the time of the four transactions. We again disagree. The knowledge element of money laundering "requires that the defendant know that the property in question is 'criminally derived,' although it does not require knowledge that the property was derived from 'specified unlawful activity.'" *United States v. Pettigrew*, 77 F.3d 1500, 1513 (5th Cir. 1996). And "criminally derived property" is defined as "any property constituting, or derived from, proceeds obtained from a criminal offense." 18 U.S.C. § 1957(f)(2). Once more, given that all of the VA funds sent to Retail Ready constituted the proceeds of criminal offenses, sufficient evidence supports Davis's knowing those funds were criminally derived. For example, the statements in his journal that "more lying is in order" and that "[he] lied to the accountant," support the proposition that Davis knew he was acquiring his VA approval through fraud.

In sum, Davis fails to show the evidence was insufficient to allow a rational jury to convict him on the money-laundering counts.

III. Indictment and Bill of Particulars

Davis also argues that the indictment was faulty and that the district court should have ordered a bill of particulars.

"We review de novo a district court's denial of a motion to dismiss the indictment, including any underlying constitutional claims." *United States v. Cordova-Soto*, 804 F.3d 714, 718 (5th Cir. 2015). We review the denial of a bill of particulars for abuse of discretion. *See United States v. Lavergne*, 805 F.2d 517, 520 (5th Cir. 1986) ("Demonstrating reversible error in the denial of such a motion is a heavy burden: 'The denial of a bill of particulars is within the sound discretion of the trial judge.'" (quoting *United States v. Montemayor*, 703 F.2d 109, 117 (5th Cir. 1983))).

For an indictment to be sufficient, it must "(1) contain[] the elements of the offense charged; (2) fairly inform[] the defendant of the charges he must prepare to meet; and (3) enable[] a defendant to plead an acquittal or a conviction in bar to future prosecutions for the same offense." *United States v. Moody*, 923 F.2d 341, 351 (5th Cir. 1991). These requirements "stem[] directly from one of the central purposes of an indictment: to ensure that the grand jury finds probable cause that the defendant has committed each element of the offense, hence justifying a trial, as required by the Fifth Amendment." *United States v. Cabrera-Teran*, 168 F.3d 141, 143 (5th Cir. 1999). Accordingly, an indictment must be "a plain, concise, and definite written statement of the essential facts constituting the offense charged." FED. R. CRIM. P. 7(c)(1).

A bill of particulars is designed "to apprise the defendant of the charge against him with sufficient precision to enable him to prepare his defense." *Montemayor*, 703 F.2d at 117. But "[i]t is not designed to

compel the government to detailed exposition of its evidence or to explain the legal theories upon which it intends to rely at trial." *United States v. Burgin*, 621 F.2d 1352, 1359 (5th Cir. 1980). After all, "[a] defendant possesses no right to a bill of particulars." *Id.* at 1358. As such, in reviewing the denial of a bill of particulars, we "can reverse only when it is established that defendant was actually surprised at trial and therefore was prejudiced in his substantial rights." *Montemayor*, 703 F.2d at 117.

The money-laundering counts of the superseding indictment alleged that four transactions involved property "derived from a specified unlawful activity, namely wire fraud." Davis argues that because the superseding indictment failed to identify the purported acts constituting wire fraud, it was faulty and rendered Davis unable to prepare an adequate defense. Specifically, the superseding indictment identified only seven acts of wire fraud that together amounted to $131,405.20. But the money-laundering charges involved transactions totaling millions of dollars. So, Davis argues that there must be a slew of unidentified crimes underlying the money-laundering charges. Because these were unspecified, Davis argues the superseding indictment was constitutionally deficient.

We disagree. The superseding indictment amply set forth the alleged scheme to defraud the VA and Retail Ready students. It alleged that Davis lied to his accountant, causing the accountant to prepare false and misleading financial statements that were then submitted to the TWC; that Davis lied about the

existence of pending criminal or civil charges; that Davis lied about Retail Ready's continuous operation for two years; and that Davis lied once more with false financial statements submitted to the TVC. The superseding indictment then went on to allege that these misrepresentations induced the VA to approve Retail Ready to begin accepting GI-Bill payments and that Davis concealed the fraudulently obtained VA approval from Retail Ready's students. It then alleged four transactions involving money that derived from funds obtained from this scheme.

The indictment thus provided Davis adequate notice about the underlying wire fraud that served as the basis for the money-laundering charges. Although the indictment only alleged seven specific acts of wire fraud, it is clear from the indictment, read as a whole, that the Government was alleging that Retail Ready was categorically ineligible to receive GI-Bill funding. As such, all GI-Bill payments to the school would have represented unlawfully acquired funds. *See Loe*, 248 F.3d at 468 (explaining that the money-laundering statute "does not require the indictment to specify which unlawful activity generated the funds in question"). Davis responds that "the word 'ineligible' appears zero times in the Indictment." That is beside the point. What matters is whether the nature of the criminal charges was evident. The indictment made that plain for anyone to see.

Accordingly, we conclude that the indictment was not faulty and the district court did not err in declining to order a bill of particulars.

IV. Jury Instructions

Davis next challenges the jury instructions, arguing that (1) the wire-fraud instruction was an impermissible constructive amendment of the indictment, and (2) the money-laundering instruction was erroneous.

A. Wire-Fraud Instruction and Constructive Amendment

"This Court reviews a constructive amendment claim *de novo*." *United States v. Bennett*, 874 F.3d 236, 256 (5th Cir. 2017). "We scrutinize any difference between an indictment and a jury instruction and will reverse only if that difference allows the defendant to be convicted of a separate crime from the one for which he was indicted." *Ibid.* (quoting *United States v. Jara-Favela*, 686 F.3d 289, 300 (5th Cir. 2012)).[5]

The Fifth Amendment guarantees criminal defendants a right to "indictment of a Grand Jury." U.S. Const. amend. V; *see*, *e.g.*, *United States v. Griffin*, 800 F.3d 198, 202 (5th Cir. 2015) ("[A]fter an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself." (quoting *Stirone v. United States*, 361 U.S. 212, 215–16

[5] The Government contends that we should apply plain-error review because Davis did not preserve this objection to the indictment. *See United States v. Daniels*, 252 F.3d 411, 414 n.8 (5th Cir. 2001). We disagree and analyze the issue *de novo*. At trial, Davis's counsel argued that "the phrase `at least one of' needs to be struck." The district court understood the objection, overruled it, and even acknowledged that the issue could be raised on appeal.

(1960))). From this it follows that constructive amendments, which "occur[] when the court 'permits the defendant to be convicted upon a factual basis that effectively modifies an essential element of the offense charged' or upon 'a materially different theory or set of facts than that which [the defendant] was charged,'" are impermissible. *United States v. Nanda*, 867 F.3d 522, 529 (5th Cir. 2017) (citations omitted).

Davis's argument relies on a slight difference in wording between the indictment and the jury instructions. He observes that the superseding indictment alleged that he "made a *series* of misrepresentations to fraudulently obtain VA approval for Retail Ready and to fraudulently induce veterans to enroll as students at Retail Ready." By contrast, the jury instructions state that the scheme to defraud must have "employed *at least one of* the following false material representations, false material pretenses, or false material promises as part of the scheme." Davis argues that by allowing him to be convicted for a scheme involving only one misrepresentation instead of a "series of misrepresentations," the district court impermissibly broadened the grounds on which he could be convicted. Davis also contends that a subsequent jury instruction—which stated that the Government must have proved a scheme that "was substantially the same as the one alleged in the superseding indictment"—was insufficient to cure the erroneous instruction.[6]

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[6] Davis also briefly argues that the jury instruction eliminated the unanimity requirement. But "the jury is not required to

Davis's arguments are unavailing. Fundamentally, Davis's complaint is "not that the indictment failed to charge the offense for which he was convicted, but that the indictment charged more than was necessary." *United States v. Miller*, 471 U.S. 130, 140 (1985). Whereas wire fraud only requires a single misrepresentation, the indictment referred to a "*series* of misrepresentations"—*more* than what was necessary to convict. But "the right to a grand jury is not normally violated by the fact that the indictment alleges more crimes or other means of committing the same crime." *Id.* at 136. Thus, the Government could have chosen to prove its case by relying on any of the means described in the indictment. And, in fact, the jury instructions still referred to all the same misrepresentations alleged in the indictment.

B. Money-Laundering Instruction

Davis next challenges the jury instructions on money laundering. We review this challenge for abuse of discretion. *See United States v. Daniels*, 247 F.3d 598, 601 (5th Cir. 2001). A trial judge has "substantial latitude in tailoring his instructions as long as they fairly and adequately cover the issues presented in a case." *United States v. Hunt*, 794 F.2d 1095, 1097 (5th Cir. 1986) (citation omitted).

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agree on the means—the specific false statement—[the defendant] used to carry out [his] fraudulent scheme." *Nanda*, 867 F.3d at 529 (quoting *United States v. LaPlante*, 714 F.3d 641, 647 (1st Cir. 2013)).

Davis argues the district court should have identified the crimes that the jury had to find were the source of the "criminally derived property." Instead, the court instructed the jury "that criminally derived property was derived from the wire fraud scheme described on pages 7–12 of these instructions." This "scheme," Davis suggests, refers not to a specific instance of wire fraud or other criminal act, but merely to an idea. And this fact, Davis contends, allowed the prosecution to escape the burden of proving thousands of instances of wire fraud.

This argument fails for the same reasons as Davis's previous argument that the money-laundering counts were limited by the seven specific wires charged in the indictment. *See supra* 13–14. The instruction that the funds used in the money-laundering transactions must be "derived from the wire fraud scheme" refers to the same premise that Retail Ready was categorically ineligible to receive VA funds and that it only received them as a result of Davis's misrepresentations. As before, the money-laundering statute "does not require the indictment to specify which unlawful activity generated the funds in question." *Loe*, 248 F.3d at 468. Rather, it "merely requires money to be derived from a particular set of federal crimes." *Ibid.* We therefore reject Davis's challenge to the money-laundering instruction.

V. Tracy Clark-Ross's Testimony

Davis also contends the district court erred by admitting expert testimony from Tracy Clark-Ross, a forensic auditor at the VA. We disagree.

Davis preserved his objection to Clark-Ross's testimony, so we review for abuse of discretion, subject to a harmless-error analysis. *United States v. Demmitt*, 706 F.3d 665, 670 (5th Cir. 2013). Under Federal Rule of Evidence 701, a lay witness's testimony is limited to only those opinions or inferences that are "(a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." FED. R. EVID. 701. Whereas "expert testimony results from a process of reasoning which can be mastered only by specialists in the field," "lay testimony results from a process of reasoning familiar in everyday life." FED. R. EVID. 701 advisory committee's note to 2000 amendment.

First, some background on Clark-Ross's testimony. Clark-Ross is a forensic auditor with the VA. Her job includes tracing assets and following the flow of funds. In this capacity, she reviewed thousands of pages of Davis's and Retail Ready's bank records. Through a careful review of those records and a process of addition and subtraction, Clark-Ross determined Davis's accounts included over $72 million in VA funds and $366,000 in non-VA funds. A chart summarizing the flow of funds from the VA to Davis to the four alleged

money-laundering purchases came into evidence during Clark-Ross's testimony. She also testified that based on the amount of non-VA money in the bank accounts, those four transactions could not have occurred without using the VA-derived money.

Davis argues that this was improperly admitted expert testimony. He challenges the admission of the chart, arguing the sums it depicts are based on mathematical calculations that are expert in nature. He also challenges the district court's allowing Clark-Ross to describe her process of adding up the funds through a hypothetical, rather than going through the thousands of transactions one-by-one at trial. Because this testimony was expert in nature, Davis contends, the jury should have been able to evaluate Clark-Ross's qualifications and reliability, as well as the factual basis for her testimony. And because Clark-Ross was the only such tracing witness, Davis asserts that improperly admitting her testimony was not harmless.

We disagree. All of Clark-Ross's testimony relied on basic math. She looked at bank records to calculate $72 million in VA funds and $366,000 in non-VA funds. She then relied on simple but tedious calculations to determine that the four purchases (amounting to $3.2 million) exceeded the amount of clean funds in Davis's accounts ($366,000). To be sure, the *volume* of the math required was large. But nothing about that process—reviewing the records and engaging in addition and subtraction—suggests it can be mastered only by specialists in the field with particularized expertise. *See Ryan Dev. Co., L.C. v. Ind. Lumbermens Mut. Ins. Co.*,

711 F.3d 1165, 1170 (10th Cir. 2013) (upholding admission of accountants' testimony that relied on "basic arithmetic, personal experience, and no outside expert reports in calculating lost income and other claims for coverage"); *United States v. Shaw*, 891 F.3d 441, 454 (3d Cir. 2018) ("His testimony was based on subtraction, not 'scientific, technical, or other specialized knowledge within the scope of Rule 702'"). Consequently, Rule 701(c) was not violated. Moreover, because her review of the records saved the court and jury copious time, Clark-Ross's testimony was helpful to the trier-of-fact, satisfying Rule 701(b). *See United States v. Georgiou*, 777 F.3d 125, 143–44 (3d Cir. 2015) (upholding admission of lay testimony that included summaries of voluminous records). We therefore reject Davis's argument that Clark-Ross's testimony was improperly admitted.

VI. SENTENCING

Davis also contests his sentence, which has three elements: a restitution order, a prison sentence, and a forfeiture order. We affirm the district court with respect to the first two elements but vacate and remand the forfeiture order for further consideration.

A. Restitution

We review restitution orders for abuse of discretion and fact findings for clear error. *United States v. Barnes*, 979 F.3d 283, 313 (5th Cir. 2020). "A factual finding is clearly erroneous only if based on the record

as a whole, we are left with the definite and firm conviction that a mistake has been committed." *United States v. Sharma*, 703 F.3d 318, 322 (5th Cir. 2012) (quotation marks omitted).

The district court adopted the PSR's proposal that the VA be paid $65,200,000 in restitution. *See generally* 18 U.S.C. § 3663A(a)(1), (a)(2), (c)(1) (mandating restitution for certain crimes). Davis objects to this amount for three reasons. First, because Retail Ready actually provided services (HVAC training) to veterans at the price the VA agreed to pay, the district court's awarding as restitution the gross amount the VA paid—without any consideration of services rendered—was erroneous. Second, as a result of this restitution award, the VA receives an impermissible windfall; the VA discharged its obligation to pay for student-veterans' education but would now be getting that money back. Third, evidence of Davis's causing the loss is lacking because the seven wire fraud convictions involved a total of $131,405.20, not $65,200,000.

Each of these arguments is meritless. First, Davis's focus on the services he provided to Retail Ready students is misplaced. "Restitution is remedial in nature; its goal is to make the victim whole." *United States v. Sanjar*, 853 F.3d 190, 215 (5th Cir. 2017); *see also United States v. Williams*, 712 F. App'x 376, 383 (5th Cir. 2017). Thus, we consider "the victims' loss," not the gross gain by the defendant. *United States v. Klein*, 543 F.3d 206, 215 (5th Cir. 2008). In cases involving "government benefits," like this one, "loss shall be considered to be not less than the value of the benefits

obtained by unintended recipients or diverted to unintended uses, as the case may be." U.S.S.G. § 2B1.1, cmt. (n. 3(F)(ii)). This means that a defendant is entitled to a credit for the fair market value of services rendered if he shows the benefits program would have paid for the services had he not fraudulently billed them. *See United States v. Mahmood*, 820 F.3d 177, 193 (5th Cir. 2016) (citing *Klein*, 543 F.3d at 213–14); *see also* U.S.S.G. § 2B1.1, cmt. (n. 3(E)(i)). But where the benefits program would not have paid for the services absent the fraud, the defendant is entitled to no such credit. *See Mahmood*, 820 F.3d at 193–94 (citing *United States v. Jones*, 664 F.3d 966, 984 (5th Cir. 2011); *United States v. Echols*, 574 F. App'x 350, 360–61 (5th Cir. 2014) (unpublished)). Davis fraudulently misrepresented Retail Ready's compliance with statutory requirements and billed the VA for the HVAC training his school provided. Thus, the VA was the victim of Davis's scheme. *See Mahmood*, 820 F.3d at 193 (determining the government program was "the victim of the [defendant's] fraud"); *Jones*, 664 F.3d at 984 ("Here, the Appellants were convicted of defrauding the government . . . therefore, the government is the relevant victim[.]"). So, regardless of any educational benefit Retail Ready's students might have received, the VA itself, as the victim, would not have paid for anything absent Davis's fraudulent misrepresentations. *See Jones*, 664 F.3d at 984.

Davis's other arguments are also unavailing. His windfall argument refers to cases teaching merely that a court cannot "award a windfall greater than the

victim's actual loss." *United States v. De Leon*, 728 F.3d 500, 506 (5th Cir. 2013) (citing *United States v. Beydoun*, 469 F.3d 102, 107–08 (5th Cir. 2006)). As already explained, Davis overlooks that the Government was the victim, and its actual loss was the $65.2 million it was fraudulently induced to pay. There was no "windfall." As for Davis's focus on the seven specifically charged wire transfers, we have already explained why this is mistaken: the broader scheme—not just the specific wires—is itself an element of the offense, and sufficient evidence showed Davis is responsible for that scheme.

Accordingly, the district court did not err in its restitution determinations.

B. Imprisonment

Davis next contests his 235-month sentence of imprisonment.

"Though we review a sentence for abuse of discretion, we review the district court's application of the guidelines *de novo* and its findings of fact at sentencing for clear error." *Klein*, 543 F.3d at 213 (citation omitted). "The district court's loss calculation is generally a factual finding that we review for clear error." *Mahmood*, 820 F.3d at 192. We review the sentence's substantive reasonableness for abuse of discretion. *Gall v. United States*, 552 U.S. 38, 46–51 (2007).

Davis's 235-month sentence falls at the bottom of the 235–293 month range calculated by the district

court. Relying on the Sentencing Guidelines, the court calculated Davis's total offense level as 38. Davis does not contest the 7-point increase for wire fraud nor the 1-point increase for money laundering. Rather, he challenges the findings underlying the 24-point increase, specifically: the court's "loss" determination; the 1-point increase for mass marketing; the 2-point increase for sophisticated means; and the 2-point increase for obstruction of justice. Based on all this, Davis claims his total offense level should have been 8 and his imprisonment range 0–6 months, rendering his 235-month sentence substantively unreasonable.

We first consider Davis's complaints about the "loss" calculation. The PSR calculated the "intended loss" at $72,200,000 and the "actual loss" (the intended loss, minus amounts refunded to the VA) at $65,200,000. Davis raises four objections. First, the *gain* to Retail Ready should not be considered as the *loss* to the VA. Second, Davis improperly received no credit for services rendered to offset any loss. Third, Davis did not *intend* the loss of $72,200,000, and the 2014 misrepresentations are insufficient to prove otherwise. Fourth, no evidence of "actual loss" was presented.

Davis is mistaken for the same reason that his challenges to the restitution calculation were mistaken. Specifically, "the correct loss calculation is 'the difference between the amount the defendant actually received and the amount he would have received absent the fraud.'" *United States v. Nelson*, 732 F.3d 504, 521 (5th Cir. 2013) (quoting *United States v. Harms*, 442 F.3d 367, 380 (5th Cir. 2006)). Again, because the

VA itself—and not the student-veterans—was the victim of the fraud and would not have paid anything absent Davis's misrepresentations, the correct calculation is the amount Davis actually received ($72,200,000 less the amount refunded, or $65,200,000) minus the amount he would have received ($0). *See Sharma*, 703 F.3d at 325. The district court's loss determination was correct.

We next consider the mass-marketing enhancement. Davis argues that the relevant inquiry is whether the fraud was committed *through* mass-marketing, and not whether mass-marketing occurred at the same time as the fraud. He observes that this enhancement applies only "if the offense" "was committed through mass-marketing." U.S.S.G. § 2B1.1(b)(2). He also notes that only criminal conduct can serve as a basis for sentencing and "the 'mass marketing' allegation appears to be based on the contention that RRCC advertised online."

These arguments find no support in our caselaw. To the contrary, we have repeatedly affirmed mass-marketing enhancements in cases where, as here, the victim was a government agency and the agency's beneficiaries were the targets of a mass-marketing campaign. *E.g.*, *United States v. Mauskar*, 557 F.3d 219, 233 (5th Cir. 2009). We have rejected the argument "that a mass marketing enhancement should not apply because [the defendant's] mass marketing efforts were not directed at the victims of the crime" where the victim was a benefits program. *United States v. Isiwele*, 635 F.3d 196, 204 (5th Cir. 2011); *see also United States*

v. Valdez, 726 F.3d 684, 694 (5th Cir. 2013) (noting the argument that "the enhancement does not apply where the mass-marketing is not targeted at the specific victims of the fraud" is "foreclosed by circuit precedent").

We next consider the sophisticated-means enhancement. "Sophisticated means" is defined as "especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense." U.S.S.G. § 2B1.1 Application Note 9(B). Davis argues that "fail[ing] to follow GAAP when submitting financial statements, chang[ing] buildings during the approval process (which was disclosed), and . . . not understand[ing] that moving business operations from one entity to another is not the same as filing a corporate name change" do not constitute "especially complex" or "especially intricate" means. This argument is premised on the idea that Davis committed mere unintentional oversights. But the district court found Davis's actions to be more akin to intentional efforts to conceal. Davis does not explain why the district court clearly erred in these findings and so we will not disturb them.

Next, we consider the obstruction-of-justice enhancement. Davis changed the title on his house and the title on a car after it had been seized. He argues that in making these changes he did not mean to obstruct justice. Rather, he argues he changed the house title to obtain a loan and changed the car title so that the car's true owner could file a civil forfeiture claim. The district court found otherwise. The court inferred that the title changes represented an attempt to evade

forfeiture—an inference supported by the timing of the title transfers, and Davis's previous contemplation of similarly deceptive transfers. Once more, Davis has not shown these findings are clearly erroneous.

Finally, Davis argues his sentence was substantively unreasonable. We disagree. We have already rejected Davis's arguments concerning his sentencing enhancements. This means that Davis was sentenced within the appropriate range—and at the bottom end, no less. We therefore find no error. *See United States v. Cooks*, 589 F.3d 173, 186 (5th Cir. 2009) ("This court applies a rebuttable presumption of reasonableness to a properly calculated, within-guidelines sentence.").

C. Forfeiture

Finally, Davis argues the district court improperly ordered him to forfeit $72 million in "proceeds" from the wire fraud. We agree with Davis that the district court applied the wrong definition of "proceeds." *See* 18 U.S.C. § 981(a)(2). We must therefore vacate the forfeiture order and remand for further proceedings.

Under 18 U.S.C. § 981(a)(1)(C), "[a]ny property . . . which constitutes or is derived from proceeds traceable" to numerous crimes, including wire fraud, is subject to forfeiture.[7] The statute defines "proceeds" in two

[7] The Seventh Circuit has helpfully traced the byzantine statutory cross-references that link the civil forfeiture statute to the proceeds of wire fraud. *See United States v. Balsiger*, 910 F.3d 942, 956–57 (7th Cir. 2018) (citing 18 U.S.C. § 981(a)(1)(C); 18

ways. *Id.* § 981(a)(2). If a case involves "illegal goods, illegal services, [or] unlawful activities," then "proceeds" means:

> property of any kind obtained directly or indirectly, as the result of the commission of the offense giving rise to forfeiture, and any property traceable thereto, and is not limited to the net gain or profit realized from the offense.

§ 981(a)(2)(A).[8] But if a case involves "lawful goods or lawful services that are sold or provided in an illegal manner," then "proceeds" means:

> the amount of money acquired through the illegal transactions resulting in the forfeiture, less the direct costs incurred in providing the goods or services.

§ 981(a)(2)(B). The district court applied the first definition, meaning Davis had to forfeit $72 million in tuition payments from the VA without deducting any of his costs in running Retail Ready.

On appeal, Davis argues for the second definition of "proceeds," because he provided "lawful services" (HVAC training) in an "illegal manner." § 981(a)(2)(B). That would let him subtract the "direct costs" of running Retail Ready. *Ibid.* In response, the Government argues for the first definition, emphasizing § 981(a)(2)(A) applies to "unlawful activities." Its argument is: (1)

U.S.C. § 1956(c)(7); 18 U.S.C. § 1961(1); 18 U.S.C. § 1343; 28 U.S.C. § 2461(c)).

[8] This definition of "proceeds" also applies to cases involving "telemarketing and health care fraud schemes." *Ibid.*

Davis's relevant conduct was not operating the school, but committing wire fraud; and (2) because wire fraud is an "unlawful activity," the first definition applies. The district court agreed with the Government, relying on a First Circuit case, *United States v. George*, 886 F.3d 31 (1st Cir. 2018), involving embezzlement. The defendant in *George* argued for the second definition on the theory that he provided lawful services (bus services) in an illegal manner (by embezzling funds). *Id.* at 40. Rejecting that argument, the First Circuit applied the first definition: "[George's] crime," the court reasoned, "was not the provision of bus services in an illegal manner but, rather, the misappropriation of government resources to his own behoof." *Id.* at 40.

We see at least two problems with the district court's approach. First, *George* does not support applying the first definition of "proceeds" to wire fraud. Consider a subsequent First Circuit decision, *United States v. Carpenter*, 941 F.3d 1 (1st Cir. 2019), which applied the second definition to wire-fraud proceeds. *Id.* at 3. *Carpenter* helpfully distinguished *George:*

> In [*George*], we explained that to fall under § 981(a)(2)(B), "the crime must involve a good or service that could, *hypothetically*, be provided in a lawful manner," while activities falling under § 981(a)(2)(A) are "inherently unlawful." [*George*], 886 F.3d at 40. There, we determined that the defendant's crime, embezzling funds from a federally funded organization, "[could not] be done lawfully" and so fell under § 981(a)(2)(A). *Id.* (quoting *United*

> *States v. Bodouva*, 853 F.3d 76, 80 (2d Cir. 2017)).
>
> By contrast, Carpenter's conviction arose out of how he solicited customers for and made misrepresentations about his [26 U.S.C.] § 1031 intermediary company. Advertising and running such a business are not "inherently unlawful" activities; rather, Benistar provided what could have been a "legal service," but which Carpenter operated in an illegal manner by misrepresenting to exchangors how their funds would be invested and investing contrary to those representations.

Id. at 7–8 (emphasis added). This reasoning is sound. There are some service-based crimes that can never be performed legally. One cannot lawfully make a living as a contract killer. *See also*, *e.g.*, *United States v. Bodouva*, 853 F.3d 76, 80 (2d Cir. 2017) ("unlawful activities" under § 981(a)(2)(A) means "inherently unlawful activities, like say the sale of foodstamps, or a robbery") (citations omitted) (cleaned up). But there are some services that, although provided illegally in one case, *could* be provided legally in another—like operating an HVAC school. *See also*, *e.g.*, *United States v. Nacchio*, 573 F.3d 1062, 1089 (10th Cir. 2009) (insider trading is not an "unlawful activity" under § 981(a)(2)(A) because "securities themselves generally are lawful"); *United States v. Mahaffy*, 693 F.3d 113, 138 (2d Cir. 2012) (same).

Under *Carpenter*'s reasoning, the second definition applies to Davis. There is a world where Davis

legitimately operated Retail Ready while lawfully receiving tuition payments from the VA. His crime therefore involved a "service that could, hypothetically, be provided in a lawful manner" (HVAC training) but that was provided in an "illegal manner" (by fraudulently obtaining GI-Bill funds to pay students' tuition). *Carpenter*, 941 F.3d at 7 (quoting *George*, 886 F.3d at 40). By contrast, Davis's crime did not involve property derived from "inherently unlawful" activities, such as embezzlement or contract killing. *Ibid.* (quoting *George*, 886 F.3d at 40). The first definition of proceeds therefore does not apply.

Second, the district court's approach would largely wipe the second definition of proceeds out of § 981(a)(2). As the Seventh Circuit has explained, "calling . . . wire fraud 'unlawful activity' " under § 981(a)(2)(A) "risks rendering § 981(a)(2)(B) superfluous and thus meaningless." *United States v. Balsiger*, 910 F.3d 942, 957 (7th Cir. 2018); *see also Nacchio*, 573 F.3d at 1088–89 (similar). All forfeitures under § 981 involve crimes. But "[i]f all unlawful conduct falls within subsection (A), it is far from clear what is left to fit within subsection (B)." *Balsiger*, 910 F.3d at 957. We should avoid a reading that makes a statute eat itself. *See*, *e.g.*, *Gulf Fishermen's Ass'n v. Nat'l Marine Fisheries Serv.*, 968 F.3d 454, 464–65 (5th Cir. 2020) (noting "anti-surplusage canon" under which courts should "give effect to all of a statute's provisions, so that no part will be inoperative or superfluous, void or insignificant") (citation omitted) (cleaned up). The better reading is the one

adopted by several other circuits and the one we adopt here: illegally provided services that could have "hypothetically" been provided in a "legal manner"—like Davis's operation of the school—implicate the second definition of proceeds under § 981(a)(2)(B), under which a defendant may deduct "the direct costs incurred in providing the goods or services." The focus of any § 981(a)(2) analysis is the underlying criminal conduct, not the crime itself.[9]

That subsection further provides that Davis "shall have the burden of proof with respect to the issue of direct costs" and also that those costs "shall not include any part of the overhead expenses of the entity providing the goods and services, or any part of the income taxes paid by the entity." *Ibid.* The district court should have the first opportunity to consider those matters. We therefore remand for the limited purpose of determining whether Davis can prove any offset under the terms of § 981(a)(2)(B).

VII. CONCLUSION

The district court's forfeiture order is VACATED and REMANDED for further proceedings consistent

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[9] To the extent that any ambiguity remains in applying the definitions of "proceeds" in § 981(a)(2), under the rule of lenity, "the tie must go to the defendant." *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality op. of Scalia, J.); *see also United States v. Cooper*, 38 F.4th 428, 434 (5th Cir. 2022) (discussing rule of lenity)

with this opinion. In all other respects, Davis's judgment and sentence are AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

UNITED STATES OF AMERICA	§ **AMENDED JUDGMENT** § **IN A CRIMINAL CASE**
v.	§ Case Number:
JONATHAN DEAN DAVIS	§ **3:20-CR-00575-X(1)** § USM Number: **18747-509** § **Derek Ryan Staub/** § **Jack Ternan/William** § **Chamblee** § Defendant's Attorney

THE DEFENDANT:

☐	pleaded guilty to count(s)	
☐	pleaded guilty to count(s) before a U.S. Magistrate Judge, which was accepted by the court.	
☐	pleaded nolo contendere to count(s) which was accepted by the court	
☒	was found guilty on count(s) after a plea of not guilty	**Counts 1s thru 7s and Counts 10s thru 13s of the Superseding Indictment, filed on March 25, 2021.**

The defendant is adjudicated guilty of these offenses:

Title & Section / Nature of Offense	**Offense Ended**	**Count**
18 U.S.C. § 1343 Wire Fraud	02/19/2016	1s
18 U.S.C. § 1343 Wire Fraud	06/06/2016	2s
18 U.S.C. § 1343 Wire Fraud	08/22/2016	3s
18 U.S.C. § 1343 Wire Fraud	09/15/2016	4s

18 U.S.C. § 1343 Wire Fraud	10/27/2016	5s
18 U.S.C. § 1343 Wire Fraud	12/30/2016	6s
18 U.S.C. § 1343 Wire Fraud	08/04/2017	7s
18 U.S.C. § 1957 and 2 Money Laundering and aiding and abetting	04/08/2016	10s
18 U.S.C. § 1957 and 2 Money Laundering and aiding and abetting	06/17/2016	11s
18 U.S.C. § 1957 and 2 Money Laundering and aiding and abetting	01/14/2017	12s
18 U.S.C. § 1957 and 2 Money Laundering and aiding and abetting	04/22/2017	13s

The defendant is sentenced as provided in pages 2 through 9 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒ The defendant has been found not guilty on count(s) Eight and Nine of the Superseding Indictment.

☒ The original indictment filed on November 18, 2020 is dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

September 22, 2021
Date of Imposition of Judgment

Brantley Starr
Signature of Judge

BRANTLEY STARR
UNITED STATES DISTRICT JUDGE
Name and Title of Judge

January 12, 2022
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

Two Hundred Thirty-Five (235) months as to counts 1s thru 7s to run concurrently with each other; and One Hundred Twenty (120) months as to counts 10s thru 13s to run concurrently with each other and counts 1s thru 7s, for an aggregrated total of 235 months.

☒ The court makes the following recommendations to the Bureau of Prisons:
That the defendant be designated to FCI – Bastrop or in the alternative FCI – Texarkana.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at ☐ a.m. ☐ p.m. on

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of : **three (3) years as to counts 1s thru 7s and 10s thru 13s to run concurrently with each other, for an aggregated total of 3 years**.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.

2. You must not unlawfully possess a controlled substance.

3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

    ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (*check if applicable*)

4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*

5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. (*check if applicable*)

6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. (*check if applicable*)

7. ☐ You must participate in an approved program for domestic violence. (*check if applicable*)

You must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.

2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.

3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.

4. You must answer truthfully the questions asked by your probation officer.

5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people

you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.

7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that

person without first getting the permission of the probation officer.

9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.

10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).

11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.

13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these

conditions. I understand additional information regarding these conditions is available at www.txnp.uscourts.gov.

Defendant's Signature _____ Date _____

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall not enter into any self-employment or business ownership while under supervision without prior approval of the probation officer.

You must not incur new credit charges, or open additional lines of credit without the approval of the probation officer.

The defendant shall provide to the probation officer complete access to all business and personal financial information.

The defendant shall pay any remaining balance of restitution as set out in this Judgment.

The defendant shall participate in outpatient mental health treatment services as directed by the probation officer until successfully discharged. These services may include medications prescribed by a licensed physician. The defendant shall contribute to the costs of services rendered (copayment) at a rate of at least $25 per month.

The defendant shall participate in an outpatient program approved by the U.S. Probation Office for treatment of narcotic, drug, or alcohol dependency, which will include testing for the detection of substance use

or abuse. The defendant shall abstain from the use of alcohol and/or all other intoxicants during and after completion of treatment. The defendant shall contribute to the costs of services rendered (copayment) at a rate of at least $25 per month.

Pursuant to the Mandatory Victims Restitution Act of 1996, the defendant is ordered to pay restitution in the amount of $65,200,000, payable to the U.S. District Clerk, 1100 Commerce Street, Room 1452, Dallas, Texas 75242. Restitution shall be payable immediately and any unpaid balance shall be payable during incarceration. Restitution shall be disbursed to:

U.S. Department of Veteran's Affairs
Debt Management Center
St. Paul, Minnesota
$65,200,000
Account No. 3:20-CR-575

If upon commencement of the term of supervised release any part of the restitution remains unpaid, the defendant shall make payments on such unpaid balance in monthly installments of not less than 10 percent of the defendant's gross monthly income, or at a rate of not less than $200 per month, whichever is greater. Payment shall begin no later than 60 days after the defendant's release from confinement and shall continue each month thereafter until the balance is paid in full. In addition, at least 50 percent of the receipts received from gifts, tax returns, inheritances, bonuses, lawsuit awards, and any other receipt of money shall be paid toward the unpaid balance within 15 days of receipt. This payment plan shall not affect the

ability of the United States to immediately collect payment in full through garnishment, the Treasury Offset Program, the Inmate Financial Responsibility Program, the Federal Debt Collection Procedures Act of 1990 or any other means available under federal or state law. Furthermore, it is ordered that interest on the unpaid balance is waived pursuant to 18 U.S.C. § 3612(f)(3).

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments page.

	Assessment	Restitution	Fine
TOTALS	$1,100.00	$65,200,000.00	$.00

AVAA Assessment*	JVTA Assessment**
$.00	

☐ The determination of restitution is deferred until An *Amended Judgment in a Criminal Case (AO245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

☐ Restitution amount ordered pursuant to plea agreement $

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the schedule of payments page may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☒ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ the interest requirement is waived for the ☐ fine ☒ restitution

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ☒ Lump sum payment of $1100.00 due immediately, balance due

☐ not later than _____ , or

☒ in accordance ☐ C, ☒ D, ☐ E, or ☒ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D or, ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of *(e.g., months or years)* to commence _____ *(e.g., 30 or 60 days)* days after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* days after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* days after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

It is ordered that the Defendant shall pay to the United States a special assessment

of $1,100.00 for Counts 1s, 2s, 3s, 4s, 5s, 6s, 7s, 10s, 11s, 12s and 13s , which shall be due immediately. Said special assessment shall be paid to the Clerk, U.S. District Court.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several
See above for Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ See Additional Defendants and Co-Defendants Held Joint and Several.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☒ The defendant shall forfeit the defendant's interest in the following property to the United States: **See Pages 8**

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine

interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

ADDITIONAL FORFEITED PROPERTY[1]

(a) $4,480,466.16 in funds seized from Bank of America account ending in 2653 on or about September 20, 2017, maintained in the name of Retail Ready Career Center;

(b) $146,370.00 in funds seized from Bank of America account ending in 0252 on or about September 20, 2017, maintained in the name of Retail Ready Career Center;

(c) $77,437.59 in funds seized from Charles Schwab account ending in 8588 on or about September 20, 2017, maintained in the name of Jonathan Davis;

(d) $9,668.28 in funds seized from Bank of Utah account ending in 2251 on or about September 20, 2017, maintained in the name of Trades United;

(e) One 2014 Lamborghini Aventador (VIN: ZHWUR1ZD0ELA02916), seized on October 6, 2017;

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[1] The Court previously ordered a stay of forfeiture proceedings as to Davis as to item (1) above (the real property at 14888 Lake Forest Drive, Dallas, Texas) pending appeal. *See* Doc. 216 (staying forfeiture of all property as to Davis); Doc. 303 (vacating forfeiture stay as to all property but the real property at 14888 Lake Forest Drive, Dallas, Texas). This amended judgment is still subject to that stay order as to the real property at 14888 Lake Forest Drive, Dallas, Texas.

(f) One 2016 Ferrari 488 (VIN: ZFF80AMA0G0219421), seized on October 6, 2017;

(g) One 2017 Bentley Continental GT V8 (VIN: SCBFH7ZA0HC063118), seized on October 11, 2017;

(h) One 2017 Mercedes-Benz AMG S63 (VIN: WDDUG7JB4HA325753, seized on October 11, 2017;

(i) One 2016 Mercedes-Benz G63 (VIN: WDCYC7DF4GX258941), seized on October 11, 2017;

(j) One 2016 Dodge Ram 2500 (VIN: 3C6UR5DL1GG314858), seized on October 11, 2017;

(k) One 2016 BMW Alpina (VIN: WBA6D6C54GGK18160), seized on October 23, 2017;

(l) Real property located at 14888 Lake Forest Drive, Dallas, Texas, also known as lot 1, block A, of a replat of Lake Forest Addition, an addition to the city of Addison, Dallas County, Texas, according to the replat thereof recorded in volume 94205, page 1934, map records, Dallas County, Texas, as corrected by certificate of corrections recorded in volume 94226, page 300, deed records, Dallas County, Texas;

(m) Real property located at 195 North 200 West, Logan, Utah, also known as beginning at the Northeast corner of Lot 8, Block 21, Plat "A" Logan City Survey, and running thence West 87.5 feet; thence North 5 rods to the place of beginning and further described as being situated in the Southeast Quarter of Section 33, Township 12 North, Range 1 East of the Salt Lake Base and Meridian; and

(n) Real property located at 1408 West 2125 South, Wellsville, Utah, also known as Lot 108, Spring Creek Village, Phase 1, as shown by the Official Plat thereof, filed September 7, 2007, as Filing No. 954131 in the Office of the Recorder of Cache County, Utah. As said Plat Map may have heretofore been amended or supplemented and in the Declaration of Covenants, Conditions and Restrictions of Spring Creek Village, recorded in Cache County, Utah as Entry No. 1005619 in Book 1588 at Page 1751 of the Official Records of the County Recorder of Cache County, Utah (as said Declaration may have heretofore been supplemented).

United States Court of Appeals
for the Fifth Circuit

No. 21-10996

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

JONATHAN DEAN DAVIS,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:20-CR-575-1

(Filed Dec. 27, 2022)

ON PETITION FOR REHEARING

Before CLEMENT, DUNCAN, and WILSON, *Circuit Judges.*

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

18 U.S.C. § 1343. Fraud by wire, radio, or television

Effective: January 7, 2008

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

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18 U.S.C. § 1957. Engaging in monetary transactions in property derived from specified unlawful activity

Effective: October 5, 2012

(a) Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived

from specified unlawful activity, shall be punished as provided in subsection (b).

(b)(1) Except as provided in paragraph (2), the punishment for an offense under this section is a fine under title 18, United States Code, or imprisonment for not more than ten years or both. If the offense involves a pre-retail medical product (as defined in section 670) the punishment for the offense shall be the same as the punishment for an offense under section 670 unless the punishment under this subsection is greater.

(2) The court may impose an alternate fine to that imposable under paragraph (1) of not more than twice the amount of the criminally derived property involved in the transaction.

(c) In a prosecution for an offense under this section, the Government is not required to prove the defendant knew that the offense from which the criminally derived property was derived was specified unlawful activity.

(d) The circumstances referred to in subsection (a) are –

(1) that the offense under this section takes place in the United States or in the special maritime and territorial jurisdiction of the United States; or

(2) that the offense under this section takes place outside the United States and such special jurisdiction, but the defendant is a United States person (as defined in section 3077 of this title, but

excluding the class described in paragraph (2)(D) of such section).

(e) Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate, and, with respect to offenses over which the Department of Homeland Security has jurisdiction, by such components of the Department of Homeland Security as the Secretary of Homeland Security may direct, and, with respect to offenses over which the United States Postal Service has jurisdiction, by the Postal Service. Such authority of the Secretary of the Treasury, the Secretary of Homeland Security, and the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury, the Secretary of Homeland Security, the Postal Service, and the Attorney General.

(f) As used in this section –

(1) the term "monetary transaction" means the deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, of funds or a monetary instrument (as defined in section 1956(c)(5) of this title) by, through, or to a financial institution (as defined in section 1956 of this title), including any transaction that would be a financial transaction under section 1956(c)(4)(B) of this title, but such term does not include any transaction necessary to preserve a person's right to

representation as guaranteed by the sixth amendment to the Constitution;

(2) the term "criminally derived property" means any property constituting, or derived from, proceeds obtained from a criminal offense; and

(3) the terms "specified unlawful activity" and "proceeds" shall have the meaning given those terms in section 1956 of this title.

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18 U.S.C. § 3663A. Mandatory restitution to victims of certain crimes

Effective: December 4, 2020

(a)(1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

(2) For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent,

incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

(3) The court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

(b) The order of restitution shall require that such defendant –

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense –

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, pay an amount equal to –

(i) the greater of –

(I) the value of the property on the date of the damage, loss, or destruction; or

(II) the value of the property on the date of sentencing, less

(ii) the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim –

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury that results in the death of the victim, pay an amount equal to the cost of necessary funeral and related services; and

(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.

(c)(1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense –

(A) that is –

(i) a crime of violence, as defined in section 16;

(ii) an offense against property under this title, or under section 416(a) of the Controlled Substances Act (21 U.S.C. 856(a)), including any offense committed by fraud or deceit;

(iii) an offense described in section 3 of the Rodchenkov Anti-Doping Act of 2019;

(iv) an offense described in section 1365 (relating to tampering with consumer products); or

(v) an offense under section 670 (relating to theft of medical products); and

(B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

(2) In the case of a plea agreement that does not result in a conviction for an offense described in paragraph (1), this section shall apply only if the plea specifically states that an offense listed under such paragraph gave rise to the plea agreement.

(3) This section shall not apply in the case of an offense described in paragraph (1)(A)(ii) or (iii) if the court finds, from facts on the record, that –

(A) the number of identifiable victims is so large as to make restitution impracticable; or

(B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

(d) An order of restitution under this section shall be issued and enforced in accordance with section 3664.

18 U.S.C. § 2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

(a) Base Offense Level:

(1) 7, if (A) the defendant was convicted of an offense referenced to this guideline; and (B) that offense of conviction has a statutory maximum term of imprisonment of 20 years or more; or

(2) 6, otherwise.

(b) Specific Offense Characteristics

(1) If the loss exceeded $6,500, increase the offense level as follows:

Loss (apply the greatest)	Increase in Level
(A) $6,500 or less	no increase
(B) More than $6,500	add 2
(C) More than $15,000	add 4
(D) More than $40,000	add 6

(**E**) More than $95,000 ..... add 8

(**F**) More than $150,000 ..... add 10

(**G**) More than $250,000 ..... add 12

(**H**) More than $550,000 ..... add 14

(**I**) More than $1,500,000 ..... add 16

(**J**) More than $3,500,000 ..... add 18

(**K**) More than $9,500,000 ..... add 20

(**L**) More than $25,000,000 ..... add 22

(**M**) More than $65,000,000 ..... add 24

(**N**) More than $150,000,000 ..... add 26

(**O**) More than $250,000,000 ..... add 28

(**P**) More than $550,000,000 ..... add 30.

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(2) (Apply the greatest) If the offense--

(A)(i) involved 10 or more victims; (ii) was committed through mass-marketing; or (iii) resulted in substantial financial hardship to one or more victims, increase by 2 levels;

(B) resulted in substantial financial hardship to five or more victims, increase by 4 levels; or

(C) resulted in substantial financial hardship to 25 or more victims, increase by 6 levels.

(3) If the offense involved a theft from the person of another, increase by 2 levels.

(4) If the offense involved receiving stolen property, and the defendant was a person in the business of receiving and selling stolen property, increase by 2 levels.

(5) If the offense involved theft of, damage to, destruction of, or trafficking in, property from a national cemetery or veterans' memorial, increase by 2 levels.

(6) If (A) the defendant was convicted of an offense under 18 U.S.C. § 1037; and (B) the offense involved obtaining electronic mail addresses through improper means, increase by 2 levels.

(7) If (A) the defendant was convicted of a Federal health care offense involving a Government health care program; and (B) the loss under subsection (b)(1) to the Government health care program was (i) more than $1,000,000, increase by 2 levels; (ii) more than $7,000,000, increase by 3 levels; or (iii) more than $20,000,000, increase by 4 levels.

(8) (Apply the greater) If –

(A) the offense involved conduct described in 18 U.S.C. § 670, increase by 2 levels; or

(B) the offense involved conduct described in 18 U.S.C. § 670, and the defendant was employed by, or was an agent of, an organization in the supply chain for the pre-retail medical product, increase by 4 levels.

(9) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency; (B) a misrepresentation or other fraudulent action during the course of a bankruptcy proceeding; (C) a violation of any prior, specific judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines; or (D) a misrepresentation to a consumer in connection with obtaining, providing, or furnishing financial assistance for an institution of higher education, increase by 2 levels. If the resulting offense level is less than level 10, increase to level 10.

(10) If (A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction

to evade law enforcement or regulatory officials; (B) a substantial part of a fraudulent scheme was committed from outside the United States; or (C) the offense otherwise involved sophisticated means and the defendant intentionally engaged in or caused the conduct constituting sophisticated means, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

(11) If the offense involved (A) the possession or use of any (i) device-making equipment, or (ii) authentication feature; (B) the production or trafficking of any (i) unauthorized access device or counterfeit access device, or (ii) authentication feature; or (C)(i) the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification, or (ii) the possession of 5 or more means of identification that unlawfully were produced from, or obtained by the use of, another means of identification, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

(12) If the offense involved conduct described in 18 U.S.C. § 1040, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

(13) If the defendant was convicted under 42 U.S.C. 408(a), 1011(a), or 1383a(a) and the statutory maximum term of ten years' imprisonment applies, increase by 4 levels. If the resulting offense level is less than 12, increase to level 12.

(14) (Apply the greater) If the offense involved misappropriation of a trade secret and the defendant knew or intended –

(A) that the trade secret would be transported or transmitted out of the United States, increase by 2 levels; or

(B) that the offense would benefit a foreign government, foreign instrumentality, or foreign agent, increase by 4 levels.

If subparagraph (B) applies and the resulting offense level is less than level 14, increase to level 14.

(15) If the offense involved an organized scheme to steal or to receive stolen (A) vehicles or vehicle parts; or (B) goods or chattels that are part of a cargo shipment, increase by 2 levels. If the resulting offense level is less than level 14, increase to level 14.

(16) If the offense involved (A) the conscious or reckless risk of death or serious bodily injury; or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by 2 levels. If the resulting offense level is less than level 14, increase to level 14.

(17) (Apply the greater) If –

(A) the defendant derived more than $1,000,000 in gross receipts from one or more financial institutions as a result of the offense, increase by 2 levels; or

(B) the offense (i) substantially jeopardized the safety and soundness of a financial institution; or (ii) substantially endangered the solvency or financial security of an organization that, at any time during the offense, (I) was a publicly traded company; or (II) had 1,000 or more employees, increase by 4 levels.

(C) The cumulative adjustments from application of both subsections (b)(2) and (b)(17)(B) shall not exceed 8 levels, except as provided in subdivision (D).

(D) If the resulting offense level determined under subdivision (A) or (B) is less than level 24, increase to level 24.

(18) If (A) the defendant was convicted of an offense under 18 U.S.C. § 1030, and the offense involved an intent to obtain personal information, or (B) the offense involved the unauthorized public dissemination of personal information, increase by 2 levels.

(19)(A) (Apply the greatest) If the defendant was convicted of an offense under:

(i) 18 U.S.C. § 1030, and the offense involved a computer system used to maintain or operate a critical infrastructure, or used by or for a government entity in furtherance of the administration of justice, national defense, or national security, increase by 2 levels.

(ii) 18 U.S.C. § 1030(a)(5)(A), increase by 4 levels.

(iii) 18 U.S.C. § 1030, and the offense caused a substantial disruption of a critical infrastructure, increase by 6 levels.

(B) If subdivision (A)(iii) applies, and the offense level is less than level 24, increase to level 24.

(20) If the offense involved –

(A) a violation of securities law and, at the time of the offense, the defendant was (i) an officer or a director of a publicly traded company; (ii) a registered broker or dealer, or a person associated with a broker or dealer; or (iii) an investment adviser, or a person associated with an investment adviser; or

(B) a violation of commodities law and, at the time of the offense, the defendant was (i) an officer or a director of a futures commission merchant or an introducing broker; (ii) a commodities trading advisor; or (iii) a commodity pool operator,

increase by 4 levels.

(c) Cross References

(1) If (A) a firearm, destructive device, explosive material, or controlled substance was taken, or the taking of any such item was an object of the offense; or (B) the stolen property received, transported, transferred, transmitted, or possessed was a firearm, destructive device, explosive material, or controlled substance, apply § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy), § 2D2.1 (Unlawful Possession; Attempt or Conspiracy),

§ 2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), or § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), as appropriate.

(2) If the offense involved arson, or property damage by use of explosives, apply § 2K1.4 (Arson; Property Damage by Use of Explosives), if the resulting offense level is greater than that determined above.

(3) If (A) neither subdivision (1) nor (2) of this subsection applies; (B) the defendant was convicted under a statute proscribing false, fictitious, or fraudulent statements or representations generally (e.g., 18 U.S.C. § 1001, § 1341, § 1342, or § 1343); and (C) the conduct set forth in the count of conviction establishes an offense specifically covered by another guideline in Chapter Two (Offense Conduct), apply that other guideline.

(4) If the offense involved a cultural heritage resource or a paleontological resource, apply § 2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological Resources), if the resulting offense level is greater than that determined above.

CREDIT(S)

(Effective November 1, 1987; amended effective June 15, 1988; November 1, 1989; November 1, 1990; November 1, 1991; November 1, 1993; November 1, 1995; November 1, 1997; November 1, 1998; November 1, 2000; November 1, 2001; November 1, 2002; January 25, 2003; November 1, 2003; November 1, 2004; November 1, 2005; November 1, 2006; November 1, 2007; February 6, 2008; November 1, 2008; November 1, 2009; November 1, 2010; November 1, 2011; November 1, 2012; November 1, 2013; November 1, 2015; November 1, 2018.)

COMMENTARY

<**Statutory Provisions:** 7 U.S.C. §§ 6, 6b, 6c, 6h, 6***o***, 13, 23; 15 U.S.C. §§ 50, 77e, 77q, 77x, 78j, 78ff, 80b-6, 1644, 6821; 18 U.S.C. §§ 38, 225, 285-289, 471-473, 500, 510, 553(a)(1), 641, 656, 657, 659, 662, 664, 1001-1008, 1010-1014, 1016-1022, 1025, 1026, 1028, 1029, 1030(a)(4)-(5), 1031, 1037, 1040, 1341-1344, 1348, 1350, 1361, 1363, 1369, 1702, 1703 (if vandalism or malicious mischief, including destruction of mail, is involved), 1708, 1831, 1832, 1992(a)(1), (a)(5), 2113(b), 2282A, 2282B, 2291, 2312-2317, 2332b(a)(1), 2701; 19 U.S.C. § 2401f; 29 U.S.C. § 501(c); 42 U.S.C. § 1011; 49 U.S.C. §§ 14915, 30170, 46317(a), 60123(b). For additional statutory provision(s) see Appendix A (Statutory Index).>

<Application Notes>

<**1. Definitions. –** For purposes of this guideline:>

<"Cultural heritage resource" has the meaning given that term in Application Note 1 of the Commentary to § 2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological Resources).>

<"Equity securities" has the meaning given that term in section 3(a)(11) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)(11)).>

<"Federal health care offense" has the meaning given that term in 18 U.S.C. § 24.>

<"Financial institution" includes any institution described in 18 U.S.C. § 20, § 656, § 657, § 1005, § 1006, § 1007, or § 1014; any state or foreign bank, trust company, credit union, insurance company, investment company, mutual fund, savings (building and loan) association, union or employee pension fund; any health, medical, or hospital insurance association; brokers and dealers registered, or required to be registered, with the Securities and Exchange Commission; futures commodity merchants and commodity pool operators registered, or required to be registered, with the Commodity Futures Trading Commission; and any similar entity, whether or not insured by the federal government. "Union or employee pension

fund" and "any health, medical, or hospital insurance association," primarily include large pension funds that serve many persons (e.g., pension funds or large national and international organizations, unions, and corporations doing substantial interstate business), and associations that undertake to provide pension, disability, or other benefits (e.g., medical or hospitalization insurance) to large numbers of persons.>

<"Firearm" and "destructive device" have the meaning given those terms in the Commentary to § 1B1.1 (Application Instructions).>

<"Foreign instrumentality" and "foreign agent" have the meaning given those terms in 18 U.S.C. § 1839(1) and (2), respectively.>

<"Government health care program" means any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by federal or state government. Examples of such programs are the Medicare program, the Medicaid program, and the CHIP program.>

<"Means of identification" has the meaning given that term in 18 U.S.C. § 1028(d)(7), except that such means of identification shall be of an actual (i.e., not fictitious) individual, other than the defendant or a person for whose conduct the defendant is accountable under § 1B1.3 (Relevant Conduct).>

<"National cemetery" means a cemetery (A) established under section 2400 of title 38, United States Code; or (B) under the jurisdiction of the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, or the Secretary of the Interior.>

<"Paleontological resource" has the meaning given that term in Application Note 1 of the Commentary to § 2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological Resources).>

<"Personal information" means sensitive or private information involving an identifiable individual (including such information in the possession of a third party), including (A) medical records; (B) wills; (C) diaries; (D) private correspondence, including e-mail; (E) financial records; (F) photographs of a sensitive or private nature; or (G) similar information.>

<"Pre-retail medical product" has the meaning given that term in 18 U.S.C. § 670(e).>

<"Publicly traded company" means an issuer (A) with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78***l***); or (13) that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78***o***(d)). "Issuer" has the meaning given that term in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. § 78c).>

<"Supply chain" has the meaning given that term in 18 U.S.C. § 670(e).>

<"Theft from the person of another" means theft, without the use of force, of property that was being held by another person or was within arms' reach. Examples include pick-pocketing and non-forcible purse-snatching, such as the theft of a purse from a shopping cart.>

<"Trade secret" has the meaning given that term in 18 U.S.C. § 1839(3).>

<"Veterans' memorial" means any structure, plaque, statue, or other monument described in 18 U.S.C. § 1369(a).>

<"Victim" means (A) any person who sustained any part of the actual loss determined under subsection (b)(1); or (13) any individual who sustained bodily injury as a result of the offense. "Person" includes individuals, corporations, companies, associations, firms, partnerships, societies, and joint stock companies.>

<2. Application of Subsection (a)(1). – >

<(A) "Referenced to this Guideline". – For purposes of subsection (a)(1), an offense is "referenced to this guideline" if (i) this guideline is the applicable Chapter Two guideline specifically referenced in Appendix A (Statutory Index) for the offense of conviction, as determined under the provisions of § 1131.2 (Applicable Guidelines); or (ii) in the case of a

conviction for conspiracy, solicitation, or attempt to which § 2X1.1 (Attempt, Solicitation, or Conspiracy) applies, this guideline is the appropriate guideline for the offense the defendant was convicted of conspiring, soliciting, or attempting to commit.>

<**(B) Definition of "Statutory Maximum Term of Imprisonment." –** For purposes of this guideline, "statutory maximum term of imprisonment" means the maximum term of imprisonment authorized for the offense of conviction, including any increase in that maximum term under a statutory enhancement provision.>

<(C) Base Offense Level Determination for Cases Involving Multiple Counts. – In a case involving multiple counts sentenced under this guideline, the applicable base offense level is determined by the count of conviction that provides the highest statutory maximum term of imprisonment.>

<3. Loss Under Subsection (b)(1). – This application note applies to the determination of loss under subsection (b)(1).>

<**(A) General Rule. –** Subject to the exclusions in subdivision (D), loss is the greater of actual loss or intended loss.>

<**(i) Actual Loss. –** "Actual loss" means the reasonably foreseeable

pecuniary harm that resulted from the offense.>

<(ii) Intended Loss. – "Intended loss" (I) means the pecuniary harm that the defendant purposely sought to inflict; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur (e.g., as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value).>

<(iii) Pecuniary Harm. – "Pecuniary harm" means harm that is monetary or that otherwise is readily measurable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm.>

<(iv) Reasonably Foreseeable Pecuniary Harm. – For purposes of this guideline, "reasonably foreseeable pecuniary harm" means pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense.>

<(v) Rules of Construction in Certain Cases. – In the cases described in subdivisions (I) through (III), reasonably foreseeable pecuniary harm shall be considered to include the pecuniary harm specified for those cases as follows:>

<(I) Product Substitution Cases. – In the case of a product substitution offense, the reasonably foreseeable pecuniary harm includes the reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered, or of retrofitting the product so that it can be used for its intended purpose, and the reasonably foreseeable costs of rectifying the actual or potential disruption to the victim's business operations caused by the product substitution.>

<(II) Procurement Fraud Cases. – In the case of a procurement fraud, such as a fraud affecting a defense contract award, reasonably foreseeable pecuniary harm includes the reasonably foreseeable administrative costs to the government and other participants of repeating or correct the procurement action affected, plus any increased costs to procure the product or service involved that was reasonably foreseeable.>

<(III) Offenses Under 18 U.S.C. § 1030. – In the case of an offense under 18 U.S.C. § 1030, actual loss includes the following

pecuniary harm, regardless of whether such pecuniary harm was reasonably foreseeable: Any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other damages incurred because of interruption of service.>

<(B) Gain. – The court shall use the gain that resulted from the offense as an alternative measure of loss only if there is a loss but it reasonably cannot be determined.>

<(C) Estimation of Loss. – The court need only make a reasonable estimate of the loss. The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence. For this reason, the court's loss determination is entitled to appropriate deference. See 18 U.S.C. § 3742(e) and (f).>

<The estimate of the loss shall be based on available information, taking into account, as appropriate and practicable under the circumstances, factors such as the following:>

<(i) The fair market value of the property unlawfully taken, copied, or destroyed; or, if the fair market value is impracticable to determine or inadequately measures the harm, the cost to the victim of replacing that property.>

<(ii) In the case of proprietary information (e.g., trade secrets), the cost of developing that information or the reduction in the value of that information that resulted from the offense.>

<(iii) The cost of repairs to damaged property.>

<(iv) The approximate number of victims multiplied by the average loss to each victim.>

<(v) The reduction that resulted from the offense in the value of equity securities or other corporate assets.>

<(vi) More general factors, such as the scope and duration of the offense and revenues generated by similar operations.>

<(D) **Exclusions from Loss. –** Loss shall not include the following:>

<(i) Interest of any kind, finance charges, late fees, penalties, amounts

based on an agreed-upon return or rate of return, or other similar costs.>

<**(ii)** Costs to the government of, and costs incurred by victims primarily to aid the government in, the prosecution and criminal investigation of an offense.>

<**(E) Credits Against Loss. –** Loss shall be reduced by the following:>

<**(i)** The money returned, and the fair market value of the property returned and the services rendered, by the defendant or other persons acting jointly with the defendant, to the victim before the offense was detected. The time of detection of the offense is the earlier of (I) the time the offense was discovered by a victim or government agency; or (II) the time the defendant knew or reasonably should have known that the offense was detected or about to be detected by a victim or government agency.>

<**(ii)** In a case involving collateral pledged or otherwise provided by the defendant, the amount the victim has recovered at the time of sentencing from disposition of the collateral, or if the collateral has not been disposed of by that time, the fair market value of the collateral at the time of sentencing.>

<**(iii)** Notwithstanding clause (ii), in the case of a fraud involving a mortgage loan, if the collateral has not been disposed of by the time of sentencing, use the fair market value of the collateral as of the date on which the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere.>

<In such a case, there shall be a rebuttable presumption that the most recent tax assessment value of the collateral is a reasonable estimate of the fair market value. In determining whether the most recent tax assessment value is a reasonable estimate of the fair market value, the court may consider, among other factors, the recency of the tax assessment and the extent to which the jurisdiction's tax assessment practices reflect factors not relevant to fair market value.>

<**(F) Special Rules. –** Notwithstanding subdivision (A), the following special rules shall be used to assist in determining loss in the cases indicated:>

<(i) Stolen or Counterfeit Credit Cards and Access Devices; Purloined Numbers and Codes. – In a case involving any counterfeit access device or unauthorized access device,

loss includes any unauthorized charges made with the counterfeit access device or unauthorized access device and shall be not less than $500 per access device. However, if the unauthorized access device is a means of telecommunications access that identifies a specific telecommunications instrument or telecommunications account (including an electronic serial number/mobile identification number (ESN/MIN) pair), and that means was only possessed, and not used, during the commission of the offense, loss shall be not less than $100 per unused means. For purposes of this subdivision, "counterfeit access device" and "unauthorized access device" have the meaning given those terms in Application Note 10(A).>

<(ii) Government Benefits. – In a case involving government benefits (e.g., grants, loans, entitlement program payments), loss shall be considered to be not less than the value of the benefits obtained by unintended recipients or diverted to unintended uses, as the case may be. For example, if the defendant was the intended recipient of food stamps having a value of $100 but fraudulently received food stamps having a value of $150, loss is $50.>

<(iii) Davis-Bacon Act Violations. – In a case involving a Davis-Bacon Act violation (i.e., a violation of 40 U.S.C. § 3142, criminally prosecuted under 18 U.S.C. § 1001), the value of the benefits shall be considered to be not less than the difference between the legally required wages and actual wages paid.>

<(iv) Ponzi and Other Fraudulent Investment Schemes. – In a case involving a fraudulent investment scheme, such as a Ponzi scheme, loss shall not be reduced by the money or the value of the property transferred to any individual investor in the scheme in access of that investor's principal investment (i.e., the gain to an individual investor in the scheme shall not be used to offset the loss to another individual investor in the scheme).>

<(v) Certain Other Unlawful Misrepresentation Schemes. – In a case involving a scheme in which (I) services were fraudulently rendered to the victim by persons falsely posing as licensed professionals; (II) goods were falsely represented as approved by a governmental regulatory agency; or (III) goods for which regulatory approval by a government agency was required but not obtained, or was obtained by fraud, loss shall

include the amount paid for the property, services or goods transferred, rendered, or misrepresented, with no credit provided for the value of those items or services.>

<(vi) Value of Controlled Substances. – In a case involving controlled substances, loss is the estimated street value of the controlled substances.>

<(vii) Value of Cultural Heritage Resources or Paleontological Resources. – In a case involving a cultural heritage resource or paleontological resource, loss attributable to that resource shall be determined in accordance with the rules for determining the "value of the resource" set forth in Application Note 2 of the Commentary to § 2B 1.5.>

<(viii) Federal Health Care Offenses Involving Government Health Care Programs. – In a case in which the defendant is convicted of a Federal health care offense involving a Government health care program, the aggregate dollar amount of fraudulent bills submitted to the Government health care program shall constitute prima facie evidence of the amount of the intended loss, *i.e.*, is evidence sufficient to establish

the amount of the intended loss, if not rebutted.>

<(ix) Fraudulent Inflation or Deflation in Value of Securities or Commodities. – In a case involving the fraudulent inflation or deflation in the value of a publicly traded security or commodity, the court in determining loss may use any method that is appropriate and practicable under the circumstances. One such method the court may consider is a method under which the actual loss attributable to the change in value of the security or commodity is the amount determined by – >

> **<(I)** calculating the difference between the average price of the security or commodity during the period that the fraud occurred and the average price of the security or commodity during the 90-day period after the fraud was disclosed to the market, and>
>
> **<(II)** multiplying the difference in average price by the number of shares outstanding.>

<In determining whether the amount so determined is a reasonable estimate of the actual loss attributable to the change in value of the security or commodity, the court may consider, among other factors, the extent to

which the amount so determined includes significant changes in value not resulting from the offense (e.g., changes caused by external market forces, such as changed economic circumstances, changed investor expectations, and new industry-specific or firm-specific facts, conditions, or events).>

<4. Application of Subsection (b)(2). – >

<(A) Definition. – For purposes of subsection (b)(2), "mass-marketing" means a plan, program, promotion, or campaign that is conducted through solicitation by telephone, mail, the Internet, or other means to induce a large number of persons to (i) purchase goods or services; (ii) participate in a contest or sweepstakes; or (iii) invest for financial profit. "Mass-marketing" includes, for example, a telemarketing campaign that solicits a large number of individuals to purchase fraudulent life insurance policies.>

<(B) Applicability to Transmission of Multiple Commercial Electronic Mail Messages. – For purposes of subsection (b)(2), an offense under 18 U.S.C. § 1037, or any other offense involving conduct described in 18 U.S.C. § 1037, shall be considered to have been committed through mass-marketing. Accordingly, the defendant shall receive at least a two-level enhancement under subsection (b)(2)

and may, depending on the facts of the case, receive a greater enhancement under such subsection, if the defendant was convicted under, or the offense involved conduct described in, 18 U.S.C. § 1037.>

<(C) Undelivered United States Mail. – >

<(i) In General. – In a case in which undelivered United States mail was taken, or the taking of such item was an object of the offense, or in a case in which the stolen property received, transported, transferred, transmitted, or possessed was undelivered United States mail, "victim" means (I) any victim as defined in Application Note 1; or (II) any person who was the intended recipient, or addressee, of the undelivered United States mail.>

<(ii) Special Rule. – A case described in subdivision (C)(i) of this note that involved – >

<(I) a United States Postal Service relay box, collection box, delivery vehicle, satchel, or cart, shall be considered to have involved at least 10 victims.>

<(II) a housing unit cluster box or any similar receptacle that contains multiple mailboxes, whether such receptacle is owned

by the United States Postal Service or otherwise owned, shall, unless proven otherwise, be presumed to have involved the number of victims corresponding to the number of mailboxes in each cluster box or similar receptacle.>

<**(iii) Definition. –** "Undelivered United States mail" means mail that has not actually been received by the addressee or the addressee's agent (e.g., mail taken from the addressee's mail box).>

<(D) Vulnerable Victims. – If subsection (b)(2)(B) or (C) applies, an enhancement under § 3A1.1(b)(2) shall not apply.>

<(E) Cases Involving Means of Identification. – For purposes of subsection (b)(2), in a case involving means of identification "victim" means (i) any victim as defined in Application Note 1; or (ii) any individual whose means of identification was used unlawfully or without authority.>

<(F) Substantial Financial Hardship. – In determining whether the offense resulted in substantial financial hardship to a victim, the court shall consider, among other factors, whether the offense resulted in the victim – >

<**(i)** becoming insolvent;>

<**(ii)** filing for bankruptcy under the Bankruptcy Code (title 11, United States Code);>

<**(iii)** suffering substantial loss of a retirement, education, or other savings or investment fund;>

<**(iv)** making substantial changes to his or her employment, such as postponing his or her retirement plans;>

<**(v)** making substantial changes to his or her living arrangements, such as relocating to a less expensive home; and>

<**(vi)** suffering substantial harm to his or her ability to obtain credit.>

<**5. Enhancement for Business of Receiving and Selling Stolen Property under Subsection (b)(4). –** For purposes of subsection (b)(4), the court shall consider the following non-exhaustive list of factors in determining whether the defendant was in the business of receiving and selling stolen property:>

<**(A)** The regularity and sophistication of the defendant's activities.>

<**(B)** The value and size of the inventory of stolen property maintained by the defendant.>

<**(C)** The extent to which the defendant's activities encouraged or facilitated other crimes.>

<**(D)** The defendant's past activities involving stolen property.>

<**6. Application of Subsection (b)(6). –** For purposes of subsection (b)(6), "improper means" includes the unauthorized harvesting of electronic mail addresses of users of a website, proprietary service, or other online public forum.>

<**7. Application of Subsection (b)(8)(B). –** If subsection (b)(8)(B) applies, do not apply an adjustment under § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).>

<**8. Application of Subsection (b)(9). –** >

<**(A) In General. –** The adjustments in subsection (b)(9) are alternative rather than cumulative. If, in a particular case, however, more than one of the enumerated factors applied, an upward departure may be warranted.>

<**(B) Misrepresentations Regarding Charitable and Other Institutions. –** Subsection (b)(9)(A) applies in any case in which the defendant represented that the defendant was acting to obtain a benefit on behalf of a charitable educational, religious, or political organization, or a government agency (regardless of whether the defendant actually was associated with the organization or government agency)

when, in fact, the defendant intended to divert all or part of that benefit (e.g., for the defendant's personal gain). Subsection (b)(9)(A) applies, for example, to the following:>

> <**(i)** A defendant who solicited contributions for a non-existent famine relief organization.>
>
> <**(ii)** A defendant who solicited donations from church members by falsely claiming to be a fundraiser for a religiously affiliated school.>
>
> <**(iii)** A defendant, chief of a local fire department, who conducted a public fundraiser representing that the purpose of the fundraiser was to procure sufficient funds for a new fire engine when, in fact, the defendant intended to divert some of the funds for the defendant's personal benefit.>

<(C) Fraud in Contravention of Prior Judicial Order. – Subsection (b)(9)(C) provides an enhancement if the defendant commits a fraud in contravention of a prior, official judicial or administrative warning, in the form of an order, injunction, decree, or process, to take or not to take a specified action. A defendant who does not comply with such a prior, official judicial or administrative warning demonstrates aggravated criminal intent and deserves additional punishment. If it is established that an entity the defendant

controlled was a party to the prior proceeding that resulted in the official judicial or administrative action, and the defendant had knowledge of that prior decree or order, this enhancement applies even if the defendant was not a specifically named party in that prior case. For example, a defendant whose business previously was enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product, is subject to this enhancement. This enhancement does not apply if the same conduct resulted in an enhancement pursuant to a provision found elsewhere in the guidelines (e.g., a violation of a condition of release addressed in § 3C1.3 (Commission of Offense While on Release) or a violation of probation addressed in § 4A1.1 (Criminal History Category)).>

<(D) College Scholarship Fraud. – For purposes of subsection (b)(9)(D):>

<"Financial assistance" means any scholarship, grant, loan, tuition, discount, award, or other financial assistance for the purpose of financing an education.>

<"Institution of higher education" has the meaning given that term in section 101 of the Higher Education Act of 1954 (20 U.S.C. § 1001).>

<(E) Non-Applicability of Chapter Three Adjustments. – >

<(i) Subsection (b)(9)(A). – If the conduct that forms the basis for an enhancement under subsection (b)(9)(A) is the only conduct that forms the basis for an adjustment under § 3B1.3 (Abuse of Position of Trust or Use of Special Skill), do not apply that adjustment under § 3B1.3.>

<(ii) Subsection (b)(9)(B) and (C). – If the conduct that forms the basis for an enhancement under subsection (b)(9)(B) or (C) is the only conduct that forms the basis for an adjustment under § 3C1.1 (Obstructing or Impeding the Administration of Justice), do not apply that adjustment under § 3C1.1.>

<9. Application of Subsection (b)(10). – >

<(A) Definition of United States. – For purposes of subsection (b)(10)(B), "United States" means each of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.>

<(B) Sophisticated Means Enhancement under Subsection (b)(10)(C). – For purposes of subsection (b)(10)(C), "sophisticated means" means especially

complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. For example, in a telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction ordinarily indicates sophisticated means. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts also ordinarily indicates sophisticated means.>

<**(C) Non-Applicability of Chapter Three Adjustment. –** If the conduct that forms the basis for an enhancement under subsection (b)(10) is the only conduct that forms the basis for an adjustment under § 3C1.1, do not apply that adjustment under § 3C1.1.>

<**10. Application of Subsection (b)(11). –** >

<(A) Definitions. – For purposes of subsection (b)(11):>

<"Authentication feature" has the meaning given that term in 18 U.S.C. § 1028(d)(1).>

<"Counterfeit access device" (i) has the meaning given that term in 18 U.S.C. § 1029(e)(2); and (ii) includes a telecommunications instrument that has been modified or altered to obtain unauthorized use of telecommunications service.>

<"Device-making equipment" (i) has the meaning given that term in 18 U.S.C.

§ 1029(e)(6); and (ii) includes (I) any hardware or software that has been configured as described in 18 U.S.C. § 1029(a)(9); and (II) a scanning receiver referred to in 18 U.S.C. § 1029(a)(8). "Scanning receiver" has the meaning given that term in 18 U.S.C. § 1029(e)(8).>

<"Produce" includes manufacture, design, alter, authenticate, duplicate, or assemble. "Production" includes manufacture, design, alteration, authentication, duplication, or assembly.>

<"Telecommunications service" has the meaning given that term in 18 U.S.C. § 1029(e)(9).>

<"Unauthorized access device" has the meaning given that term in 18 U.S.C. § 1029(e)(3).>

<(B) Authentication Features and Identification Documents. – Offenses involving authentication features, identification documents, false identification documents, and means of identification, in violation of 18 U.S.C. § 1028, also are covered by this guideline. If the primary purpose of the offense, under 18 U.S.C. § 1028, was to violate, or assist another to violate, the law pertaining to naturalization, citizenship, or legal resident status, apply § 2L2.1 (Trafficking in a Document Relating to Naturalization) or § 2L2.2 (Fraudulently Acquiring Documents

Relating to Naturalization), as appropriate, rather than this guideline.>

<(C) Application of Subsection (b)(11)(C)(i). – >

<(i) In General. – Subsection (b)(11)(C)(i) applies in a case in which a means of identification of an individual other than the defendant (or a person for whose conduct the defendant is accountable under § 1B1.3 (Relevant Conduct)) is used without that individual's authorization unlawfully to produce or obtain another means of identification.>

<(ii) Examples. – Examples of conduct to which subsection (b)(11)(C)(i) applies are as follows:>

<(I) A defendant obtains an individual's name and social security number from a source (e.g., from a piece of mail taken from the individual's mailbox) and obtains a bank loan in that individual's name. In this example, the account number of the bank loan is the other means of identification that has been obtained unlawfully.>

<(II) A defendant obtains an individual's name and address from a source (e.g., from a driver's license in a stolen wallet) and

applies for, obtains, and subsequently uses a credit card in that individual's name. In this example, the credit card is the other means of identification that has been obtained unlawfully.>

<**(iii) Non-applicability of Subsection (b)(11)(C)(i). –** Examples of conduct to which subsection (b)(11)(C)(i) does not apply are as follows:>

<**(I)** A defendant uses a credit card from a stolen wallet only to make a purchase. In such a case, the defendant has not used the stolen credit card to obtain another means of identification.>

<**(II)** A defendant forges another individual's signature to cash a stolen check. Forging another individual's signature is not producing another means of identification.>

<**(D) Application of Subsection (b)(11)(C)(ii). –** Subsection (b)(11)(C)(ii) applies in any case in which the offense involved the possession of 5 or more means of identification that unlawfully were produced or obtained, regardless of the number of individuals in whose name (or other identifying information) the means of identification were so produced or so obtained.>

<11. Interaction of Subsection (b)(13) and § 3B1.3 (Abuse of Position of Trust or Use of Special Skill). – If subsection (b)(13) applies, do not apply § 3B1.3.>

<12. Application of Subsection (b)(15). – Subsection (b)(15) provides a minimum offense level in the case of an ongoing, sophisticated operation (e.g., an auto theft ring or "chop shop") to steal or to receive stolen (A) vehicles or vehicle parts; or (B) goods or chattels that are part of a cargo shipment. For purposes of this subsection, "vehicle" means motor vehicle, vessel, or aircraft. A "cargo shipment" includes cargo transported on a railroad car, bus, steamboat, vessel, or airplane.>

<13. Gross Receipts Enhancement under Subsection (b)(17)(A). – >

> **<(A) In General. –** For purposes of subsection (b)(17)(A), the defendant shall be considered to have derived more than $1,000,000 in gross receipts if the gross receipts to the defendant individually, rather than to all participants, exceeded $1,000,000.>
>
> **<(B) Definition. –** "Gross receipts from the offense" includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. See 18 U.S.C. § 982(a)(4).>

<14. Application of Subsection (b)(17)(B). –>

<(A) Application of Subsection (b)(17)(B)(i). – The following is a non-exhaustive list of factors that the court shall consider in determining whether, as a result of the offense, the safety and soundness of a financial institution was substantially jeopardized:>

<(i) The financial institution became insolvent.>

<(ii) The financial institution substantially reduced benefits to pensioners or insureds.>

<(iii) The financial institution was unable on demand to refund fully any deposit, payment, or investment.>

<(iv) The financial institution was so depleted of its assets as to be forced to merge with another institution in order to continue active operations.>

<(v) One or more of the criteria in clauses (i) through (iv) was likely to result from the offense but did not result from the offense because of federal government intervention, such as a "bailout".>

<(B) Application of Subsection (b)(17)(B)(ii). – >

<(i) Definition. – For purposes of this subsection, "organization" has the meaning given that term in Application Note 1 of § 8A1.1 (Applicability of Chapter Eight).>

<(ii) In General. – The following is a non-exhaustive list of factors that the court shall consider in determining whether, as a result of the offense, the solvency or financial security of an organization that was a publicly traded company or that had more than 1,000 employees was substantially endangered:>

<(I) The organization became insolvent or suffered a substantial reduction in the value of its assets.>

<(II) The organization filed for bankruptcy under Chapters 7, 11, or 13 of the Bankruptcy Code (title 11, United States Code).>

<(III) The organization suffered a substantial reduction in the value of its equity securities or the value of its employee retirement accounts.>

<(IV) The organization substantially reduced its workforce.>

<**(V)** The organization substantially reduced its employee pension benefits.>

<**(VI)** The liquidity of the equity securities of a publicly traded company was substantially endangered. For example, the company was delisted from its primary listing exchange, or trading of the company's securities was halted for more than one full trading day.>

<**(VII)** One or more of the criteria in subclauses (I) through (VI) was likely to result from the offense but did not result from the offense because of federal government intervention, such as a "bailout".>

<15. Application of Subsection (b)(19). – >

<(A) Definitions. – For purposes of subsection (b)(19):>

<"Critical infrastructure" means systems and assets vital to national defense, national security, economic security, public health or safety, or any combination of those matters. A critical infrastructure may be publicly or privately owned. Examples of critical infrastructures include gas and oil production, storage, and delivery systems, water supply systems, telecommunications networks, electrical power

delivery systems, financing and banking systems, emergency services (including medical, police, fire, and rescue services), transportation systems and services (including highways, mass transit, airlines, and airports), and government operations that provide essential services to the public.>

<"Government entity" has the meaning given that term in 18 U.S.C. § 1030(e)(9).>

<(B) Subsection (b)(19)(A)(iii). – If the same conduct that forms the basis for an enhancement under subsection (b)(19)(A)(iii) is the only conduct that forms the basis for an enhancement under subsection (b)(17)(B), do not apply the enhancement under subsection (b)(17)(B).>

<16. Application of Subsection (b)(20). – >

<(A) Definitions. – For purposes of subsection (b)(20):>

<"Commodities law" means (i) the Commodity Exchange Act (7 U.S.C. § 1 et seq.) and 18 U.S.C. § 1348; and (ii) includes the rules, regulations, and orders issued by the Commodity Futures Trading Commission.>

<"Commodity pool operator" has the meaning given that term in section 1a(11) of the Commodity Exchange Act (7 U.S.C. § 1a(11)).>

<"Commodity trading advisor" has the meaning given that term in section 1a(12) of the Commodity Exchange Act (7 U.S.C. § 1a(12)).>

<"Futures commission merchant" has the meaning given that term in section 1a(28) of the Commodity Exchange Act (7 U.S.C. § 1a(28)).>

<"Introducing broker" has the meaning given that term in section 1a(31) of the Commodity Exchange Act (7 U.S.C. § 1a(31)).>

<"Investment adviser" has the meaning given that term in section 202(a)(11) of the Investment Advisers Act of 1940 (15 U.S.C. § 80b-2(a)(11)).>

<"Person associated with a broker or dealer" has the meaning given that term in section 3(a)(18) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)(18)).>

<"Person associated with an investment adviser" has the meaning given that term in section 202(a)(17) of the Investment Advisers Act of 1940 (15 U.S.C. § 80b-2(a)(17)).>

<"Registered broker or dealer" has the meaning given that term in section 3(a)(48) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)(48)).>

<"Securities law" (i) means 18 U.S.C. §§ 1348, 1350, and the provisions of law

referred to in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)(47)); and (ii) includes the rules, regulations, and orders issued by the Securities and Exchange Commission pursuant to the provisions of law referred to in such section.>

<(B) In General. – A conviction under a securities law or commodities law is not required in order for subsection (b)(20) to apply. This subsection would apply in the case of a defendant convicted under a general fraud statute if the defendant's conduct violated a securities law or commodities law. For example, this subsection would apply if an officer of a publicly traded company violated regulations issued by the Securities and Exchange Commission by fraudulently influencing an independent audit of the company's financial statements for the purposes of rendering such financial statements materially misleading, even if the officer is convicted only of wire fraud.>

<(C) Nonapplicability of § 3B1.3 (Abuse of Position of Trust or Use of Special Skill). – If subsection (b)(20) applies, do not apply § 3B1.3.>

<17. Cross Reference in Subsection (c)(3). – Subsection (c)(3) provides a cross reference to another guideline in Chapter Two (Offense Conduct) in cases in which the defendant is convicted of a general fraud statute, and the

count of conviction establishes an offense involving fraudulent conduct that is more aptly covered by another guideline. Sometimes, offenses involving fraudulent statements are prosecuted under 18 U.S.C. § 1001, or similarly general statute, although the offense involves fraudulent conduct that is also covered by a more specific statute. Examples include false entries regarding currency transactions, for which § 2S1.3 (Structuring Transactions to Evade Reporting Requirements) likely would be more apt, and false statements to a customs officer, for which § 2T3.1 (Evading Import Duties or Restrictions (Smuggling); Receiving or Trafficking in Smuggled Property) likely would be more apt. In certain other cases, the mail or wire fraud statutes, or other relatively broad statutes, are used primarily as jurisdictional bases for the prosecution of other offenses. For example, a state employee who improperly influenced the award of a contract and used the mails to commit the offense may be prosecuted under 18 U.S.C. § 1341 for fraud involving the deprivation of the intangible right of honest services. Such a case would be more aptly sentenced pursuant to § 2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions).>

<18. Continuing Financial Crimes Enterprise. – If the defendant is convicted under 18 U.S.C. § 225 (relating to a continuing

financial crimes enterprise), the offense level is that applicable to the underlying series of offenses comprising the "continuing financial crimes enterprise".>

<19. Partially Completed Offenses. – In the case of a partially completed offense (e.g., an offense involving a completed theft or fraud that is part of a larger, attempted theft or fraud), the offense level is to be determined in accordance with the provisions of § 2X1.1 (Attempt, Solicitation, or Conspiracy) whether the conviction is for the substantive offense, the inchoate offense (attempt, solicitation, or conspiracy), or both. See Application Note 4 of the Commentary to § 2X1.1.>

<20. Multiple-Count Indictments. – Some fraudulent schemes may result in multiple-count indictments, depending on the technical elements of the offense. The cumulative loss produced by a common scheme or course of conduct should be used in determining the offense level, regardless of the number of counts of conviction. See Chapter Three, Part D (Multiple Counts).>

<21. Departure Considerations. – >

<(A) Upward Departure Considerations. – There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in

determining whether an upward departure is warranted:>

<**(i)** A primary objective of the offense was an aggravating, non-monetary objective. For example, a primary objective of the offense was to inflict emotional harm.>

<**(ii)** The offense caused or risked substantial non-monetary harm. For example, the offense caused physical harm, psychological harm, or severe emotional trauma, or resulted in a substantial invasion of a privacy interest (through, for example, the theft of personal information such as medical, educational, or financial records).>

<An upward departure would be warranted, for example, in an 18 U.S.C. § 1030 offense involving damage to a protected computer, if, as a result of that offense, death resulted.>

<An upward departure also would be warranted, for example, in a case involving animal enterprise terrorism under 18 U.S.C. § 43, if, in the course of the offense, serious bodily injury or death resulted, or substantial scientific research or information were destroyed.>

<Similarly, an upward departure would be warranted in a case

involving conduct described in 18 U.S.C. § 670 if the offense resulted in serious bodily injury or death, including serious bodily injury or death resulting from the use of the pre-retail medical product.>

<**(iii)** The offense involved a substantial amount of interest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs, not included in the determination of loss for purposes of subsection (b)(1).>

<**(iv)** The offense created a risk of substantial loss beyond the loss determined for purposes of subsection (b)(1), such as a risk of a significant disruption of a national financial market.>

<**(v)** In a case involving stolen information from a "protected computer", as defined in 18 U.S.C. § 1030(e)(2), the defendant sought the stolen information to further a broader criminal purpose.>

<**(vi)** In a case involving access devices or unlawfully produced or unlawfully obtained means of identification:>

<**(I)** The offense caused substantial harm to the victim's

reputation, or the victim suffered a substantial inconvenience related to repairing the victim's reputation.>

<**(II)** An individual whose means of identification the defendant used to obtain unlawful means of identification is erroneously arrested or denied a job because an arrest record has been made in that individual's name.>

<**(III)** The defendant produced or obtained numerous means of identification with respect to one individual and essentially assumed that individual's identity.>

<**(B) Upward Departure for Debilitating Impact on a Critical Infrastructure.** – An upward departure would be warranted in a case in which subsection (b)(19)(A)(iii) applies and the disruption to the critical infrastructure(s) is so substantial as to have a debilitating impact on national security, national economic security, national public health or safety, or any combination of those matters.>

<**(C) Downward Departure Consideration. –** There may be cases in which the offense level determined under this guideline substantially overstates the

seriousness of the offense. In such cases, a downward departure may be warranted.>

<For example, a securities fraud involving a fraudulent statement made publicly to the market may produce an aggregate loss amount that is substantial but diffuse, with relatively small loss amounts suffered by a relatively large number of victims. In such a case, the loss table in subsection (b)(1) and the victims table in subsection (b)(2) may combine to produce an offense level that substantially overstates the seriousness of the offense. If so, a downward departure may be warranted.>

<(D) Downward Departure for Major Disaster or Emergency Victims. – If (i) the minimum offense level of level 12 in subsection (b)(12) applies; (ii) the defendant sustained damage, loss, hardship, or suffering caused by a major disaster or an emergency as those terms are defined in 42 U.S.C. § 5122; and (iii) the benefits received illegally were only an extension or overpayment of benefits received legitimately, a downward departure may be warranted.>

<**Background:** This guideline covers offenses involving theft, stolen property, property damage or destruction, fraud, forgery, and counterfeiting (other than offenses

involving altered or counterfeit bearer obligations of the United States).>

<Because federal fraud statutes often are broadly written, a single pattern of offense conduct usually can be prosecuted under several code sections, as a result of which the offense of conviction may be somewhat arbitrary. Furthermore, most fraud statutes cover a broad range of conduct with extreme variation in severity. The specific offense characteristics and cross references contained in this guideline are designed with these considerations in mind.>

<The Commission has determined that, ordinarily, the sentences of defendants convicted of federal offenses should reflect the nature and magnitude of the loss caused or intended by their crimes. Accordingly, along with other relevant factors under the guidelines, loss serves as a measure of the seriousness of the offense and the defendant's relative culpability and is a principal factor in determining the offense level under this guideline.>

<Theft from the person of another, such as pickpocketing or non-forcible purse-snatching, receives an enhanced sentence because of the increased risk of physical injury. This guideline does not include an enhancement for thefts from the person by means of force or fear; such crimes are robberies and are covered under § 2B3.1 (Robbery).>

<A minimum offense level of level 14 is provided for offenses involving an organized

scheme to steal vehicles or vehicle parts. Typically, the scope of such activity is substantial, but the value of the property may be particularly difficult to ascertain in individual cases because the stolen property is rapidly resold or otherwise disposed of in the course of the offense. Therefore, the specific offense characteristic of "organized scheme" is used as an alternative to "loss" in setting a minimum offense level.>

<Use of false pretenses involving charitable causes and government agencies enhances the sentences of defendants who take advantage of victims' trust in government or law enforcement agencies or the generosity and charitable motives of victims. Taking advantage of a victim's self-interest does not mitigate the seriousness of fraudulent conduct; rather, defendants who exploit victims' charitable impulses or trust in government create particular social harm. In a similar vein, a defendant who has been subject to civil or administrative proceedings for the same or similar fraudulent conduct demonstrates aggravated criminal intent and is deserving of additional punishment for not conforming with the requirements of judicial process or orders issued by federal, state, or local administrative agencies.>

<Offenses that involve the use of financial transactions or financial accounts outside the United States in an effort to conceal illicit profits and criminal conduct involve a particularly high level of sophistication and

complexity. These offenses are difficult to detect and require costly investigations and prosecutions. Diplomatic processes often must be used to secure testimony and evidence beyond the jurisdiction of United States courts. Consequently, a minimum offense level of level 12 is provided for these offenses.>

<Subsection (b)(5) implements the instruction to the Commission in section 2 of Public Law 105-101 and the directive to the Commission in section 3 of Public Law 110-384.>

<Subsection (b)(7) implements the directive to the Commission in section 10606 of Public Law 111-148.>

<Subsection (b)(8) implements the directive to the Commission in section 7 of Public Law 112-186.>

<Subsection (b)(9)(D) implements, in a broader form, the directive in section 3 of the College Scholarship Fraud Prevention Act of 2000, Public Law 106-420.>

<Subsection (b)(10) implements, in a broader form, the instruction to the Commission in section 6(c)(2) of Public Law 105-184.>

<Subsections (b)(11)(A)(i) and (B)(i) implement the instruction to the Commission in section 4 of the Wireless Telephone Protection Act, Public Law 105-172.>

<Subsection (b)(11)(C) implements the directive to the Commission in section 4 of the Identity Theft and Assumption Deterrence

Act of 1998, Public Law 105-318. This subsection focuses principally on an aggravated form of identity theft known as "affirmative identity theft" or "breeding", in which a defendant uses another individual's name, social security number, or some other form of identification (the "means of identification") to "breed" (i.e., produce or obtain) new or additional forms of identification. Because 18 U.S.C. § 1028(d) broadly defines "means of identification", the new or additional forms of identification can include items such as a driver's license, a credit card, or a bank loan. This subsection provides a minimum offense level of level 12, in part because of the seriousness of the offense. The minimum offense level accounts for the fact that the means of identification that were "bred" (i.e., produced or obtained) often are within the defendant's exclusive control, making it difficult for the individual victim to detect that the victim's identity has been "stolen." Generally, the victim does not become aware of the offense until certain harms have already occurred (e.g., a damaged credit rating or an inability to obtain a loan). The minimum offense level also accounts for the non-monetary harm associated with these types of offenses, much of which may be difficult or impossible to quantify (e.g., harm to the individual's reputation or credit rating, inconvenience, and other difficulties resulting from the offense). The legislative history of the Identity Theft and Assumption Deterrence Act of 1998 indicates that

Congress was especially concerned with providing increased punishment for this type of harm.>

<Subsection (b)(12) implements the directive in section 5 of Public Law 110-179.>

<Subsection (b)(14) implements the directive in section 3 of Public Law 112-269.>

<Subsection (b)(16)(B) implements, in a broader form, the instruction to the Commission in section 110512 of Public Law 103-322.>

<Subsection (b)(17)(A) implements, in a broader form, the instruction to the Commission in section 2507 of Public Law 101-647.>

<Subsection (b)(17)(B)(i) implements, in a broader form, the instruction to the Commission in section 961(m) of Public Law 101-73.>

<Subsection (b)(18) implements the directive in section 209 of Public Law 110-326.>

<Subsection (b)(19) implements the directive in section 225(b) of Public Law 107-296. The minimum offense level of level 24 provided in subsection (b)(19)(B) for an offense that resulted in a substantial disruption of a critical infrastructure reflects the serious impact such an offense could have on national security, national economic security, national public health or safety, or a combination of any of these matters.>